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Supreme Court, U.S.
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In the

Supreme Court of the United States

JAY E. ORZECHOWSKI,

Petitioner,

v.

YORK INTERNATIONAL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether an employee injured during the course of his employment is considered disabled under the standard for a disability under the Americans With Disabilities Act ("ADA") when the employee has presented substantial and credible evidence that he was regarded both as disabled by his employer and by his physician.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 1

A. Summary of Allegations in the Complaint 2

B. The Decisions Below 3

Reasons for Granting the Petition 4

I. The Circuits Are Split 4

II. The Court Should Adopt The Reasoning and Analysis of the First and Third Circuit Court of Appeals with Regard to the Meaning of "Substantially Limited" 6

Conclusion 7

Appendix

Appendix A - Sixth Circuit Opinion - 03/28/06 . . . . 1a

Appendix B - District Court Memorandum and Order - 02/03/05 . . . . . 9a

Appendix C - District Court Order - 02/03/05 . . . 13a

Appendix D - District Court Magistrate's Report and Recommendation - 12/03/04 . . . . . 15a

Appendix E - O.R.C. § 4112.02 . . . . . 36a

TABLE OF AUTHORITIES

Cases

Lowry v. Cabletron Systems, Inc.,
973 F. Supp. 77 (1997) 5

McKay v. Toyota Motor Manufacturing,
110 F. 3d 369 (1997) 5

Quint v. A.E. Staley Manufacturing Company,
172 F. 3d 1 (1999) 5

Toyota Motor Mfg. v. Williams,
534 U.S. 184 (2002) 4

Whitfield v. Pathmark Stores, Inc.,
39 F. Supp. 2d 434 (1999) 5

Statutes and Rules

O.R.C. § 4112.02 . . . . . 1, 2

Sup. Ct. R. 13.1 1

28 U.S.C. § 1254 1

28 U.S.C. § 1332 1

28 U.S.C. § 2101 1

Opinions Below

The ruling of the United States Court of Appeals for the Sixth Circuit dated March 28, 2006 affirming the decision of the District Court was not recommended for full-text publication and is reproduced at App. A at 1a-8a.

The order of the United States District Court of the Northern District of Ohio dismissing the plaintiff's complaint dated February 3, 2005 is is reproduced at App. B and C at 9a-14a.

Jurisdiction

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on March 28, 2006. This petition is timely filed under 28 U.S.C. Section 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Sixth Circuit pursuant to U.S.C. Section 1254.

Statutory Provisions Involved

The relevant statutory provision is Ohio Revised Code Section 4112.02 set out at App. E at 36a-55a.

Statement of Case

The jurisdiction of the district court was invoked under 28 U.S.C. Section 1332 (diversity of citizenship). The plaintiff brought claims for breach of contract, promissory estoppel, violation of good faith and fair dealing, intentional and negligent infliction of emotional distress, discharge in

violation of public policy and handicap discrimination in violation of Ohio Revised Code Section 4112.02. The district court granted defendant's motion to dismiss plaintiff's claims of promissory estoppel, intentional and negligent infliction of emotional distress and violation of good faith and fair dealing. The district court denied the motion to dismiss plaintiff's claims of breach of contract, discharge in violation of public policy and handicap discrimination.

A. Summary of the Allegations in the Complaint

Plaintiff Jay Orzechowski (Plaintiff) was employed from February of 1991 by defendant York International Corporation (Defendant) until terminated on October 31, 2000. (Plaintiff's Complaint). In August 1999, Plaintiff injured his back while employed by Defendant. Plaintiff inquired with Defendant about workers compensation and was told that the Defendant was self insured and that he would be placed on disability. On October 28, 1999, Plaintiff went on leave under the Family and Medical Leave Act of 1993 ("FMLA") for a period of 12 weeks. After the 12 week period of his FMLA leave ended, Plaintiff received short term disability benefits and had surgery on his back on February 28, 2000. After the surgery, Plaintiff continued to experience problems with his back. Beginning on May 1, 2000, Plaintiff received long term disability benefits. Based upon his medical condition, Plaintiff alleged that he was disabled for purposes of the ADA and Ohio Handicap Statute and that he was further protected by the public policy of the State of Ohio.

In August 2000, while providing an update on his medical progress at Defendant's local office, Plaintiff inquired about a part-time work program enumerated in Defendant's Employees Handbook. The branch manager at the office told

Plaintiff he did not kno[w] anything about a part-time work program. Plaintiff a[d]d that he had requested an accommodation of part-time work for his disability. Approximately one month later, Plaintiff attended a branch meeting at the same office and spoke to Ben King, the head of Human Resource at the time. Mr. King told Plaintiff that he had one year from the date of his disability beginning October 28, 1999 to return to work with Defendant or be terminated from employment. Mr. King would not respond to Plaintiff's inquiries regarding the part-time work program in Defendant's Employees Handbook. Plaintiff alleged that the part-time work program created an implied contract for continued employment with Defendant.

During this time, Plaintiff was receiving medical treatment for his injury and was expecting to return to work full-time by February 2001. On October 18, 2000, during a phone conversation with Rose Mitchell, an employee in the human resource department at Defendant's office in Norman, Oklahoma, Plaintiff was told that he would be terminated effective October 31, 2000. In addition to his lost wages and benefits, Plaintiff also alleged that the termination caused him to suffer emotional distress.

B. The Decisions Below

The District Court dismissed the complaint, holding that the Plaintiff had failed to establish a genuine issue of material fact as to whether the Defendant intended to enter into a contract for part-time work when it presented the employee handbook. The District Court further held that the Plaintiff's evidence was insufficient to raise a genuine issue of fact as to whether he was disabled.

The Court of Appeals affirmed the judgment of the district court based upon the reasoning set out in the report and recommendation of the magistrate judge adopted by the district court in its order of February 3, 2005. The Court of Appeals did not issue a full written opinion.

REASONS FOR GRANTING THE PETITION

This case presents an important issue of federal law on which the Circuits are split. The Sixth Circuit's unreasonable requirements on plaintiffs to establish whether they a disabled for purposes of the ADA and Ohio Handicap Statute places an undue and almost impossible burden on similarly situated plaintiffs. Simply stated, plaintiffs that can establish a record of disability should not have their cases dismissed but rather should have their day in court.

I. THE CIRCUITS ARE SPLIT

In Toyota Motor Mfg. v. Williams, 534 U.S. 184, 195 (2002), this Court set forth the basic approach to determine whether an employee is disabled. (Merely having an impairment does not make one disabled; the employee must demonstrate that the impairment substantially limits a major life activity). The decision in Toyota did not adopt any particular bright line statement as to what "substantially limits" means. As a result, the district courts have defined and interpreted the meaning of "substantially limits" on a case by case basis.

The Sixth Circuit's decision in the instant case results in an overly narrow and restrictive definition of the term and places an almost impossible burden on plaintiffs defending summary judgment. The Sixth Circuit's decision that plaintiff was not disabled because his impairment restricted him only

from a narrow range of jobs did not consider plaintiff's record of impairment. On this point there is a clear split in the Circuits.

In Whitfield v. Pathmark Stores, Inc., 39 F. Supp. 2d 434 (1999), the plaintiff provided evidence that the employer believed the plaintiff was recovering from a back injury. In addition, plaintiff provided further evidence of permanent medical restrictions and could not work for the employer for approximately eighteen months. Id. at 444. The Court in Whitfield held that the plaintiff had produced evidence adequate to survive summary judgment on the issue of whether she has a record of an impairment which substantially limits a major life activity. Id. In Quint v. A.E. Staley Manufacturing Company, 172 F. 3d 1 (1999), the First Circuit Court of Appeals held that the plaintiff's lifting restrictions in that case "probably precluded a lot of physical jobs." In Lowry v. Cabletron Systems, Inc., 973 F. Supp. 77 (1997), The First Circuit had earlier looked to the employee's record of impairment in determining that the employee was substantially limited in the major life activity of working. In the First and Third Circuit Court of Appeals, plaintiffs who are able to establish physical impairment are able to proceed to trial in the district courts.

By contrast, in McKay v. Toyota Motor Manufacturing, 110 F. 3d 369 (1997), the Sixth Circuit Court of Appeals reached a different conclusion based upon similar facts. In McKay, the plaintiff, an assembly line worker in the body-weld division of Toyota, developed carpal tunnel syndrome and was restricted from lifting more than ten pounds, from pushing or pulling, and from using vibrating tools. The plaintiff in McKay claimed that she was terminated in violation of the ADA. The Sixth Circuit affirmed summary judgment holding that the physical restrictions and impairment

did not restrict her ability to perform a broad range of jobs in various classes. Id. at 373. The Sixth Circuit reached a similar result in the instant case. The Plaintiff was able to establish the following; 1) the defendant regarded him as a disabled employee; 2) he was receiving long-term disability benefits; 3) he was restricted from repetitive bending from the waist and heavy lifting in excess of twenty pounds. It was undisputed that the Plaintiff's injuries were permanent. Despite his record of impairment, the court granted summary judgment in favor of the employer.

The Sixth Circuit in the instant case has taken an approach to defining and interpreting "substantially limited" that differs from the approach taken by the First and Third Circuits. Given the conflicting views on this issue, it is critical that this Court provide further guidance to the federal courts on the meaning of "substantially limited" for the purpose of the ADA.

II. THE COURT SHOULD ADOPT THE REASONING AND ANALYSIS OF THE FIRST AND THIRD CIRCUIT COURT OF APPEALS WITH REGARD TO THE MEANING OF "SUBSTANTIALLY LIMITED"

The Sixth Circuit's decisions in ADA cases have essentially hinged on whether an employee is substantially limited in a major life activity. The burden of proof incumbent on an ADA plaintiff is particularly formidable. However, this burden should not be impossible. The First and Third Circuits have used a fairer and more balanced approach in determining whether an employee is considered disabled. Review and reversal to the Sixth Circuit's approach in making that determination will advance and promote both fairness and confidence in the district courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-3301

[Filed March 28, 2006]

JAY E. ORZECHOWSKI,
Plaintiff-Appellant,

v.

YORK INTERNATIONAL CORPORATION,
Defendant-Appellee.

On Appeal from
The United States District Court
For the Northern District of Ohio
No. 1:02CV2341
Judge Ann Aldrich

Before: DAUGHTREY and McKEAGUE, Circuit Judges, and McCALLA,* District Judge.

* The Hon. Jon Phipps McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

OPINION

PER CURIAM. The plaintiff, Jay Orzechowski, appeals from the grant of summary judgment to defendant York International Company, the plaintiff's former employer. Orzechowski contends that York wrongfully terminated his employment in breach of an implied contract and in violation of state law prohibiting discrimination against employees with disabilities. The defendant contends that we lack jurisdiction to hear the appeal because Orzechowski failed properly to specify the "court to which appeal is taken," as required by Federal Rule of Appellate Procedure 3(c)(1)(C). Orzechowski filed a timely notice of appeal, but it recited that the appeal was taken to the District Court for the Northern District of Ohio, rather than to the Sixth Circuit Court of Appeals. We conclude that, under existing circuit precedent, we have jurisdiction to review the district court's judgment but, further, that there is no basis upon which to disturb that judgment.

JURISDICTION

The notice of appeal in question stated that the plaintiff "hereby appeals to the United States District Court for the Northern District of Ohio, Eastern Division, from an Order dismissing Plaintiff's case entered in this action on the 3rd day of February, 2005." Relying on two unpublished opinions, York argues that "compliance with Rule 3(c) is 'mandatory and jurisdictional,'" and that as a result of Orzechowski's error this court lacks jurisdiction over this appeal. What York fails to address is our en banc decision in *Dillon v. United States*, in which we held that:

> [W]hile the requirements of Rule 3(c) are jurisdictional in the sense that a notice of appeal must

> explicitly name the court to which an appeal is taken when there is more than one potential appellate forum, where only one avenue of appeal exists, Rule 3(c)(1)(C) is satisfied even if the notice of appeal does not name the appellate court. Under the latter circumstances, filing the notice of appeal with the clerk of the district court from whose judgment the appeal is taken has the practical effect of designating the appropriate court of appeals and thereby eliminating any possible confusion with respect to the appellate forum.

184 F.3d 556, 557 (6th Cir. 1999) (en banc) (internal citation omitted). *See also Caudill v. Hollan,* 431 F.3d 900, 905 (6th Cir. 2005) ("[I]f the notice of appeal was technically deficient, we hold that such a technical deficiency should not prevent us from reaching the merits of the appeal, nor does such a technical deficiency divest us of jurisdiction to hear the appeal. To rule otherwise would be to rely on an overly technical reading of Fed. R. App. P. 3(c).").

Although in this case Orzechowski did not merely omit the name of the court to which he was appealing but, instead, incorrectly identified the intended court, it is clear that he was appealing to the Sixth Circuit. Moreover, there was no prejudice to York, and Orzechowski eventually corrected the

error.[1] We hold that the careless but obviously unintentional error does not defeat jurisdiction in this case.

York also argues that we lack jurisdiction to hear Orzechowski's appeal of the dismissal of his promissory estoppel claim because the notice of appeal does not specify his intent to appeal the February 14, 2003, dismissal of that claim. However, "[i]t has long been the rule 'that an appeal of a final judgment draws into question all prior non-final rulings and orders."' *Caudill,* F.3d at 904. Moreover, this issue is of little consequence. Although Orzechowski attempts to revive his promissory estoppel claim on appeal, he does so by rolling the promissory estoppel claim into his breach of contract claim. The breach of contract claim is clearly within our jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

Orzechowski worked for York from February 1, 1991, until he was terminated on October 31, 2000. During his employment he "shipped and received freight; pulled orders for York's trucks; handled customer pickups and customer relations; coordinated freight and performed warehouse maintenance." On August 25, 1999, Orzechowski injured his back while "pulling orders." Despite his injury, Orzechowski

---

[1] In a letter dated July 20, 2005, Orzechowski's attorney informed the court that:

> The Notice of Appeal incorrectly indicates that the Appellant is appealing to the U.S. District Court for the Northern District of Ohio. This was an unintentional typographical error and should instead designate the Sixth Circuit Court of Appeals as the Court Appellant is appealing to.

continued to work his regular hours and duties until he was diagnosed by Dr. Goliat with a herniated disk on October 8, 1999, and was advised not to work for two weeks. He returned to work on October 25, 1999. According to Orzechowski, on October 27, 1999, the operations manager sent him to the emergency room because his condition became so severe.

Orzechowski was placed on leave on October 28, 1999, under the Family and Medical Leave Act. For the first eight weeks of his leave, Orzechowski received salary continuation. From December 24, 1999, through the end of April 2000, he received short-term disability. On May 1, 2000, Orzechowski began receiving long-term disability benefits. Under York's policy, Orzechowski had one year from his last day of work to return and, if he failed to do so, was subject to immediate termination. If terminated, however, Orzechowski could continue to receive long-term disability benefits, as long as he paid the monthly premium.

There is some disagreement as to when the countdown began for Orzechowski's return to work. According to Orzechowski, he was informed that he had one year from the date he went on disability to return to work, *i.e.*, May 1, 2001. York disputes this and notes that under its policy, Orzechowski needed to return to work within one year from the last day he worked, October 27, 2000, in order to avoid termination. Despite the dispute over this date, it is important to note that Orzechowski was not medically released to work until July 11, 2002. Thus, as the magistrate judge noted, "Plaintiff has not introduced evidence showing he was capable to return to work prior to May 1, 2001. Therefore, as York asserts, even assuming Plaintiff's assertion [regarding his termination date] as true, Plaintiff has not shown that he would not have been terminated on May 31, 2001."

Orzechowski contends that he attempted to return to work part-time in August 2000, as allowed by York's "part-time work incentive program." The part-time work provision, which appears in the explanation of York's disability policy in its employee handbook and forms the basis for the alleged implied contract in the complaint, states:

> The Company realizes that disability causes many changes in your life. We want to encourage you to return to work even on a part-time basis if you are capable and you feel it will help you in your adjustment to life with a disability.
>
> If you are able to return to work on a part-time basis while you are receiving LTD benefits, you will continue to receive benefits in addition to your part-time pay.
>
> The Part-time Work Incentive provision is very simple. During the first 12 months of a return to work, your LTD benefits will not be offset by any "return to work" earnings, until these benefits combined with your return-to-work earnings exceed your pre-disability earnings (your base monthly pay in effect just prior to the date your disability began).

This provision of the disability plan offered by York and administered by Aetna applies to part-time employment regardless of whether that employment was through York or a different employer. Orzechowski was told it might be "feasible" to come back part-time, but apparently there were no available part-time jobs, and he did not return to work at York prior to his eventual termination.

Almost two years later, on July 8, 2002, Orzechowski contacted Payton regarding the possibility of returning to York on a part-time basis. Payton informed him that he would need to attain a release from his physician and that there would need to be a part-time position available for him to return to York. She also told Orzechowski that there were no available part-time positions at that time but reminded him that he was "free to pursue part-time work with other employers." Orzechowski was medically released a few days later, on July 11, 2002, and began working part-time as an usher and projectionist at a local movie theater.

On October 25, 2002, Orzechowski filed a complaint against York in state court alleging: (1) breach of contract; (2) promissory estoppel; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; (5) violation of good faith and fair dealing; (6) violation of public policy; and (7) handicap discrimination in violation of Ohio state law. York removed this action to the United States District Court for the Northern District of Ohio on the basis of diversity of citizenship and filed a motion to dismiss for failure to state a claim. The district court granted the motion as to Orzechowski's claims of promissory estoppel, intentional and negligent infliction of emotional distress, and violation of good faith and fair dealing. The motion was denied as to Orzechowski's claims of breach of contract, violation of public policy, and handicap discrimination.

York then filed a motion for summary judgment that was referred to a magistrate judge, who found that there was no implied contract between York and Orzechowski as to part-time employment. The judge also found no basis for relief based on the plaintiff's theory of promissory estoppel. As to the remaining claims, the judge found that the plaintiff had failed to establish that he had suffered discrimination as a

result of a disability or that his termination violated Ohio state law. The district court adopted the magistrate judge's report and recommendation that there were no sustainable grounds for relief and dismissed the complaint on summary judgment.

ANALYSIS

York correctly notes that Orzechowski does not cite any legal error in the district court's determination, nor does he allege that there are disputed issues of fact. After examining the record on appeal, the briefs, and the applicable law, we conclude that the magistrate judge correctly analyzed and decided the issues in this case. In light of the opinion below, the issuance of a full, written opinion by this court would be duplicative and would serve no useful purpose. Accordingly, we AFFIRM the judgment of the district court based upon the reasoning set out in the report and recommendation of the magistrate judge adopted by the district court in its order of February 3, 2005.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:02CV2341

[Filed February 3, 2005]

JAY E. ORZECHOWSKI,
Plaintiff,

v.

YORK INTERNATIONAL CORPORATION,
Defendant.

Judge Ann Aldrich
Magistrate Judge Vecchiarelli

MEMORANDUM AND ORDER

In this diversity action, Plaintiff Jay E. Orzechowski ("Orzechowski") brings claims of breach of contract, discharge in violation of public policy, and handicap discrimination in violation of Ohio Revised Code §§ 4112.01(A)(13), 4112.02 and 4112.99 against his former

employer, York International Corporation ("York")[1]. On September 11, 2003, York filed a motion for summary judgment in its favor (Docket No. 28). Now before the court is the report and recommendation issued by Magistrate Judge Nancy Vecchiarelli, recommending that York's motion be granted (Docket No. 39), and Orzechowski's objections thereto (Docket No. 41).

For the following reasons, the Court adopts the magistrate judge's findings of fact and conclusions of law, and grants summary judgment in favor of York.

I. Background

This Court adopts the statement of facts and the thorough procedural history provided by Magistrate Judge Nancy Vecchiarelli. In her report and recommendation, the magistrate judge carefully details the relevant facts and dates regarding the onset of Orzechowski's injury and his termination by York. Orzechowski does not challenge any of the facts set forth in the report and recommendation.

Upon consideration of the issues involved, Magistrate Judge Vecchiarelli recommended that this court grant summary judgment to York, because Orzechowski has failed to demonstrate the existence of any genuine issues of material fact on his claims for breach of contract or handicap discrimination.

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[1] Orzechowksi originally added claims of promissory estoppel, intentional infliction of emotional distress, negligent infliction of emotional distress, and violation of the duty of good faith and fair dealing. The court dismissed these additional complaints in an opinion dated February 14, 2003 (Docket No. 20).

II. Discussion

Federal Rule of Civil Procedure 72(b) requires this Court to review *de novo* any portion of the Magistrate Judge's disposition to which specific objections have been made. Accordingly, Local Rule 72.3(b) requires that objections "specifically identify the portions of the proposed findings, recommendations, or reports to which objection is made and the basis for such objections." A District Judge "shall make *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge." *Id.*

Although Orzechowski enumerates eight ostensible objections to the magistrate judge's report, these amount to no more than bare, unsubstantiated statements of disagreement, *e.g.*, "1. [Orzechowski objects] [t]o the finding that no material issue of fact exists which would preclude summary judgment on the issues presented by the Plaintiff." The court does not doubt that Orzechowski disagrees with the adverse findings entered by the magistrate judge; however such conclusory statements do not persuade the court that the facts and evidence mandate a contrary result.

In fact, by indicating without elaborating that he disagrees with the magistrate judge on each of the issues before the court, Orzechowski runs afoul of the Sixth Circuit's admonition that a "general objection ... which fails to specify the issues of contention, does not satisfy the requirement that an objection be filed. The objections must be clear enough to enable the district court to discern those issues that are dispositive and contentious." *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995), citing *Howard v. Secretary of Health and*

Human Servs., 932 F.2d 505, 508-09 (6th Cir. 1991)). Orzechowski's objections are directly analogous to those filed in *Miller*, in which the plaintiff "disputed the correctness of the magistrate's recommendation but failed to specify the findings that she believed were in error." *Id.*

The court has reviewed the compelling arguments and citations provided by the magistrate judge in support of her recommendation, and agrees that Orzechowski has not carried his burden to demonstrate the existence of genuine issues of material fact on any of his remaining claims. Given this review, and the lack of specificity in Orzechowski's objections, the court sees no justification for reaching any other conclusion than that proposed by the Magistrate Judge Vecchiarelli.

III. Conclusion

For the foregoing reasons, this court adopts Magistrate Judge Vecchiarelli's findings of fact and conclusions of law, and enters summary judgment in favor of York.

This order is final and appealable.

IT IS SO ORDERED.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: February 3, 2005

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:02CV2341

[Filed February 3, 2005]

JAY E. ORZECHOWSKI,	)
Plaintiff,	)
	)
v.	)
	)
YORK INTERNATIONAL CORPORATION,	)
Defendant.	)
	)

Judge Ann Aldrich

ORDER

The Court having filed its Memorandum granting the motion for summary judgment to York International. This order is pursuant to Rule 58 of the Civil Rules of Procedure. Case is terminated.

This order is final and appealable.

IT IS SO ORDERED.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: February 3, 2005

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:02CV2341

[Filed December 3, 2004]

JAY E. ORZECHOWSKI,	)
Plaintiff,	)
	)
v.	)
	)
YORK INTERNATIONAL CORPORATION,	)
Defendant.	)
	)

Judge Ann Aldrich
Magistrate Judge Vecchiarelli

REPORT & RECOMMENDATION

On September 11, 2003, Defendant, York International Corporation ("York"), filed a Motion for Summary Judgment. (Doc. No. 28.) This matter was referred to the Magistrate Judge for a Report and Recommendation. For the reasons set forth in detail below, the Magistrate Judge recommends York's motion (Doc. No. 28) be GRANTED.

I. Factual Background

In February 1991, York hired Plaintiff, Jay Orzechowski, as a warehouseman at the Valley View, OH facility, a part of York's Tri-state branch. (Doc. No. 28, Exh. 3, Deposition of Jay E. Orzechowski ("Orzechowski Dep."), pp. 41, 51-52.) At York, Plaintiff: shipped and received freight; pulled orders for York's trucks; handled customer pickups and customer relations; coordinated freight; and performed warehouse maintenance. (*Id.* at 41-44.)

On August 25, 1999, Plaintiff injured his back while pulling orders for York's truck. (*Id.* at 33-37.) Plaintiff continued to work his regular hours and perform his regular duties until October 8, 1999, the date on which Plaintiff's doctor diagnosed him with a herniated disk and indicated he could not work for two weeks (*Id.* at 60, 70.) Plaintiff returned to work on October 25, 1999 and worked until October 27, 1999. *(Id.* at 59, 60.) Plaintiff did not return to work at York after this date due to his back injury. (*Id.*)

On October 28, 1999, York placed Plaintiff on leave for twelve weeks pursuant to the Family Medical Leave Act, and Plaintiff received salary continuation for eight weeks, *i.e.*, until December 23, 1999. (*Id.* at 34, 79-80.) Thereafter, on December 24, 1999, Plaintiff received short-term disability until approximately the end of April, 2000. (*Id.* at 79-80; Doc. No. 28, Exh. 7, Letter from Division Director of York's Human Resources Dept. To Plaintiff ("Human Resources Letter").) In February 2000, Plaintiff had surgery on his back to relieve a compressed nerve. (Orzechowski Dep., pp. 75-76.) On May 1, 2000, Plaintiff started receiving long-term disability ("LTD") benefits. (Human Resources Letter.)

In May 2000, Plaintiff claims he contacted the Division Director of York's Human Resources, Becky Payton ("Payton"), who informed him that he had one year from the date that he went on disability, *i.e.*, May 1, 2000, to return to work or be terminated. (Orzechowski Dep., p. 18.) In August 2000, Plaintiff claims that he attempted to return to work pursuant to York's part-time incentive program. (*Id.* at 17-18.) However, Plaintiff claims that York's Tri-state branch manager, Robert Sykes ("Sykes"), told Plaintiff that he did not know about the part-time program, and that Plaintiff should talk to someone else at York about it. (*Id.* at 18.) Plaintiff claims that York had a receptionist position available at this time. (*Id.* at 52-53.)

In September 2000, Plaintiff attended York's branch meeting and spoke with York's Vice President of Human Resources, Benjamin King ("King"). (*Id.* at 19.) Plaintiff claims that King told him he had one year from the date he stopped working to return to work or be terminated. As Plaintiff stopped working on October 27, 1999, this meant he had until October 27, 2000 to return to work or be terminated. (*Id.* at 20.) Shortly after the meeting, Plaintiff met with his superior, Linda Riley ("Riley"). (*Id.* at 56.) Plaintiff claims that Riley confirmed with Payton that Plaintiff had until May 1, 2001, not October 27, 2000, in which to return to work. (*Id.*) On October 18, 2000, York's Disability and Workers' Compensation Administrator, Rosemary Mitchell ("Mitchell"), telephoned Plaintiff. (Doc. No. 28, Exh. 4, Deposition of Rosemary Mitchell ("Mitchell Dep."), p. 6.) Mitchell informed Plaintiff that he would receive a letter from Payton stating his employment would be terminated effective October 31, 2000. (*Id.* at 7; Orzechowski Dep., p. 57; Doc. No. 28, Exh. 6, Deposition of Becky Payton ("Payton Dep."), p. 7.) Mitchell informed Plaintiff that he would continue to receive long-term disability benefits as long as he

paid the monthly premium payments. (Mitchell Dep., p. 7.) York terminated Plaintiff on October 31, 2000.[1]

In April 2001, Plaintiff filed a worker's compensation claim for his August 1999 injury, which was subsequently denied. (Orzechowski Dep., pp. 24, 33.)

In July 2002, Plaintiff contacted Payton and inquired about part-time work. (*Id.* at 10.) Payton informed Plaintiff that he may be re-employed in part-time status with York as long as (1) Plaintiff was medically released by his physician to return to work and (2) York had a part-time position available. (*Id.* at 25; Payton Dep., p. 11, 15.) Plaintiff contacted Sykes regarding the availability of York's part-time positions. Sykes told Plaintiff that there were no part-time jobs available at the facility. (Orzechowski Dep., p. 92.)

II. Procedural Background

Plaintiff filed a complaint in state court against York alleging: (1) breach of contract; (2) promissory estoppel; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; (5) violation of good faith and fair dealing; (6) violation of public policy; and (7) handicap discrimination in violation of Ohio Revised Code ("O.R.C.") Sections 4112.01(A)(13), 4112.02, and 4112.99. On

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[1] York asserts that it has an extended disability policy in which it terminates employees who have been on disability leave extending beyond twelve consecutive months. Plaintiff does not challenge York's termination policy, but instead claims that York misled him about his termination date when Payton told him that he would be terminated one year after he began receiving *long-term* disability, *i.e.*, May 1, 2001 (and not one year after he went on disability leave, *i.e.*, October 31, 2000), if he remained away from work.

November 27, 2002, York filed in U.S. District Court a Notice of Removal from state court based on diversity of citizenship. (Doc. No. 1.)

On December 13, 2002, York filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 8.) On February 14, 2003, the District Court granted in part and denied in part York's Motion to Dismiss. (Doc. No. 20.) Specifically, the court granted the motion to dismiss Plaintiff's claims of promissory estoppel, intentional and negligent infliction of emotional distress, and violation of good faith and fair dealing; the court denied the motion to dismiss the claims of breach of contract, discharge in violation of public policy, and handicap discrimination in violation of O.R.C. Section 4112.02.

On September 11, 2003, York filed a Motion for Summary Judgment, which is now before this Court for a Report and Recommendation. (Doc. No. 28.)

III. Standard of Review

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. The moving party can meet this burden in two ways: by presenting sufficient evidence to indicate there is no genuine issue of material fact; or by arguing the non-moving party, after adequate time for discovery, has failed to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The moving party may rely on depositions, answers to interrogatories, and the like, to demonstrate that the non-moving party has no evidence to

prove his case and hence that there can be no factual dispute. *See id.* at 328 (White, J., concurring). But "it is not enough to move for summary judgment... with a conclusory assertion that the [non-moving party] has no evidence to prove his case." *Id.*

In assessing the merits of the motion, the court shall draw all justifiable inferences from the evidence presented in the record in the light most favorable to the non-moving party. *Woythal v. Tex-Tenn Corp.*, 112 F.3d 243, 245 (6th Cir.), *cert. denied,* 522 U.S. 967 (1997). The court's favorable treatment of facts and inferences, however, does not relieve the non-moving party of the responsibility "to go beyond the pleadings" to oppose an otherwise properly supported motion for summary judgment under Rule 56(e). *See Celotex,* 477 U.S. at 324.

An opponent to a motion for summary judgment may not rest upon the mere allegations or denials of his pleadings, but must set forth through competent and material evidence specific facts showing that there is a genuine issue for trial. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Further, "the mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby,* 477 U.S. 242, 248-49 (1986).

Accordingly, viewing the evidence in the light most favorable to the non-moving party, the court should determine "whether the evidence presents a sufficient disagreement to

require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251.

IV. Analysis

A. Breach of Contract

Plaintiff alleges that York's part-time work incentive program ("part-time program") set forth in its employee handbook created an implied contract for York to provide him, an employee on long-term disability, with a part-time position. Plaintiff alleges that York breached this contract in August 2000 when he attempted to return to work at York pursuant to the part-time program, but York denied him the opportunity and subsequently fired him on October 31, 2000. York asserts that this section in the handbook did not create a contract between it and Plaintiff because: (1) the handbook clearly states that the plan is administered through a third-party insurance carrier, Aetna; and (2) under the terms, if an employee is medically released to work, he may work part-rime for *any employer* and continue to receive LTD benefits.

York's FlexChoice Disability Options handbook contains a section titled "Benefit Amounts - Long-Term Disability," which includes a subsection labeled "Part-Time Work Incentive." (Doc N 28, Exh. 5, FlexChoice Disability Options handbook, ("Disability Handbook"), 9.) This subsection states:

> The Company realizes that disability causes many changes in your life. We want to encourage you to return to work even on a part-time basis if you are capable and you feel it will help you in your adjustment to life with a disability.

> If you are able to return to work on a part-time basis while you are receiving [long term disability (LTD] benefits, you will continue to receive benefits in addition to your part-time pay.

(*Id.*) Further, the section then discusses how an employee's LTD benefits may be reduced, depending on the employee's return-to-work earnings. (*Id.* at 9-10.)

Under a theory of implied contract, the terms of employee handbooks, policy manuals, and the like may alter the initial at-will nature of the employment. *Uebelacker v. Cincom Systems, Inc.*, 48 Ohio App. 3d 268, 272-73 (1988). In order to have this effect, however, both parties must have intended for the language in handbooks to be legally binding; that is, the employee's belief that the handbook affords him contractual rights does not mean that it does unless the employer intends it to do so. *See Smiddy v. Kinko's, Inc.*, 2003 Ohio App. LEXIS 460, 16 (2003); *see also Cohen & Co. v. Messina*, 24 Ohio App. 3d 22, 24 (1985) ("[I]n order for [] manuals to be considered valid contracts, there must be a 'meeting of the minds.' The parties must have a distinct and common intention which is communicated by each party to the other.") As in all contracts, express or implied, both parties must intend to be bound. *Smiddy*, 2003 Ohio App. LEXIS 460 at 16. "Absent mutual assent, a handbook becomes merely a unilateral statement of rules and policies which create no obligation and rights." *Tohline v. Central Trust Co., N.A.*, 48 Ohi App. 3d 280, 282 (1988).

In the instant action, Plaintiff has not established a genuine issue of material fact as to whether York intended to enter into a contract for part-time work when it presented the

handbook.[2] The part-time program section primarily discusses how an employee's LTD benefit amounts may or may not be affected *if* the employee obtains part-time work. The section does not state that York will provide the part-time work, or even that the employee can seek only part-time work for York. Moreover, York's lack of intent to be bound is evidenced by: Plaintiff's inquiries to Sykes and King in August 2000 regarding the part-time program; and York's lack of jobs for part-time employees. Sykes told Plaintiff that he did not know about the part-time program and King did not reply to the inquiry. Further, Plaintiff acknowledges that he did not know of any part-time employees at the Valley View facility during the ten years he was employed. (Orzechowski Dep., p. 52.) Therefore, Plaintiff cannot establish that York's handbook created a meeting of the minds between York and him that York would provide a part-time position to employees on LTD.[3]

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[2] Plaintiff also alleges that oral representations made by York employees created an implied contract. However, Plaintiff has not presented any such representations in or prior to August 2000 indicating that York intended to provide him with part-time work. Plaintiff refers only to his discussion with Payton in May 2000, in which he claims that Payton told him he would be terminated on May 1, 2001 (not his actual termination date of October 31, 2000), if he remained away from work on LTD for one full year. However, this alleged representation is irrelevant to the analysis of whether an implied contract for part-time employment existed. There is absolutely no indication that this representation created a contract for Plaintiff to return to work on a part-time status.

[3] In July 2002, Plaintiff again contacted Payton and inquired about part-time work. Payton informed Plaintiff that he may be re-employed in part-time status with York as long as (1) Plaintiff was medically released by his physician to return to work and (2) York had a part-time position available. Since this representation contains

B. Handicap Discrimination

Plaintiff alleges that York denied him part-time work and terminated him because of his handicap in violation of O.R.C. §§ 4112.01(A)(13), 4112.02, and 4112.99. York asserts that: (1) Plaintiff is not handicapped under O.R.C. § 4112; it terminated Plaintiff's employment pursuant to company policy; and (3) Plaintiff could not perform the essential functions of the job.

Under O.R.C. § 4112.02, an employer is prohibited from terminating, refusing to hire, or otherwise discriminating against an employee because of the employee's disability.[4] To establish a *prima facie* case of handicap discrimination, the employee must demonstrate: (1) that he was handicapped;

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contingencies, it does not promise or guarantee that York would provide Plaintiff with a part-time position in July 2002. *See Mason v. U.S. Fidelity and Guaranty Co.*, 69 Ohio App. 3d 309, 314 (1990) (Employee returning from LTD could not reasonably presume absolute job security from employer's "return to work" provision in the handbook because reinstatement was tied to two contingencies, *i.e.*, employee's capability and available position). Moreover, Plaintiff has not set forth a genuine issue of material fact that York had a part-time position available at his time. Plaintiff acknowledges that he did not know of any part-time employees at the Valley View facility during the ten years he was employed. Further, Sykes told Plaintiff that there were no part-time jobs available at the facility.

[4] Since Ohio's handicap discrimination law is similar to the federal Americans with Disabilities Act ("ADA"), Ohio courts may look to federal regulations and cases interpreting the federal Act for guidance in interpreting state handicap discrimination law. *City of Columbus Cir. Serv. Comm'n v. McGlone*, 82 Ohio St. 3d 569, 573 (1998).

(2) that an adverse employment action was taken by the employer, at least in part, because the employee was handicapped; and (3) that the employee, though handicapped, can safely and substantially perform the essential functions of the job in question. *City of Columbus Civ. Serv. Comm'n v. McGlone*, 82 Ohio St. 3d 569, 573 (1998). If the employee can establish a *prima facie* case, the burden then shifts to the employer to set forth some legitimate, nondiscriminatory reason for the action taken. *Hood v. Diamond Prods.*, 74 Ohio St. 3d 298, 302 (1996). Finally, if the employer establishes a nondiscriminatory reason for the action taken, then the employee must demonstrate that the employer's stated reason was a pretext for impermissible discrimination. *Id.*

1. Disability/Handicap

York asserts that Plaintiff is not disabled and it did not regard him as disabled under state law. "Disability" means a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment. O.R.C. § 4112.01(A)13); *see also Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 195 (2002) (Merely having an impairment does not make one disabled; the employee must demonstrate that the impairment substantially limits a major life activity). "Substantially limits" means (1) unable to perform a major life activity that the average person in the general population can perform, or (2) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the

general population can perform that same major life activity. 29 C.F.R. § 1630.2(j)(1). The following factors should be considered in determining whether an individual is substantially limited in a major life activity: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2).

With respect to the major life activity of working, "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. 29 C.F.R. § 1630.2(j)(3)(I). The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. *Id.*

a. Having a Disability

York claims that Plaintiff is not substantially limited from the major life activity of working because: after the back injury in August 1999 he continued to work his regular hours as a warehouseman until October 1999; and Plaintiff is working thirty hours per week as an usher and projectionist at a movie theater. (Orzechowksi Dep., pp. 62-64, 66-67.)

Plaintiff claims that he has a physical disability that substantially limits the major life activity of working due to his back injury sustained in August 1999. Plaintiff asserts that his condition limits his ability to do repetitive work because he needs to "sit down for a little while" and "stand for a little while" and needs to keep moving. (Orzechowski Dep., p. 65.) Dr. James Faremouth, an orthopedic surgeon, reviewed Plaintiff's medical records and concluded that Plaintiff's MRI

and complaints support a clinical impression of chronic lumbar radiculopathy status, post surgical therapy lumbar spine. Dr. Faremouth concluded that Plaintiff could not perform a job involving repetitive bending from the waist to the floor or which involves heavy lifting in excess of twenty pounds on a regular or occasional basis. Further, Plaintiff asserts that he has severe back pain and numbness in his right leg. (Orzechowski Dep., p. 59.) Therefore, Plaintiff claims that he is significantly restricted as to the condition, manner or duration under which he can work as compared to the condition, manner, or duration under which the average person in the general population can work.

Plaintiff's evidence is insufficient to raise a genuine issue of material fact as to whether he was disabled. *See McKay v. Toyota Motor Manufacturing,* 110 F.3d 369 (6th Cir. 1997). In *McKay,* the plaintiff, an assembly line worker in the body-weld division of Toyota, developed carpal tunnel syndrome and was restricted from lifting more than ten pounds, from pushing or pulling, and from using vibrating tools, *Id.* at 370. The plaintiff in *McKay* claimed that she was terminated in violation of the ADA. In affirming summary judgment, the court in *McKay* held:

> [T]he physical restrictions caused by plaintiff's disability do not significantly restrict her ability to perform the class of jobs at issue, manufacturing jobs; at best, her evidence supports a conclusion that her impairment disqualifies her from only the narrow range of assembly line manufacturing jobs that *require repetitive motion or frequent lifting of more than ten pounds.* It follows that her limited impairment would not significantly restrict her ability to perform a broad range of jobs in various classes.

Id. at 373 (emphasis added);[5] *see also Law v. City of Scottsville,* 2000 U.S. LEXIS 14512, *18 (6th Cir. 2000) (unpublished) (Following *McKay*, the court found that the plaintiff, at most, established that he was restricted from performing the job of sanitation worker but did not establish that he is restricted from a class or range of jobs).

Similarly, Plaintiff here claims that he cannot perform work with repetitive activity or lift more than twenty pounds. Further, Plaintiff has been employed as an usher and projectionist at a movie theater since October 2002. In line with the reasoning set forth in *McKay*, this Court concludes that Plaintiff has established only that his impairment restricts him from only the narrow range of jobs consisting of repetitive activities or frequent lifting of more than twenty pounds. Therefore, Plaintiff has not raised a genuine issue of material fact on whether he was disabled.

b. "Regarded as" Disabled

Plaintiff claims that York regarded him as disabled. An individual is regarded as having a disability if the individual: (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) has no physical or mental impairment but is treated by a covered entity as having a substantially

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[5] Although the plaintiff in *McKay* had a college degree, the court did not base its holding on this fact. The court in *McKay* found that the plaintiff could perform manufacturing jobs that did not involve repetitive motion or frequent lifting. Clearly, such jobs do not require a college degree.

limited impairment. *See Fitzmaurice v. Great Lakes Computer Corp.*, 155 Ohio App. 3d 724, 728 (2004). The Sixth Circuit has stated the difficulty an employee faces in proving that his employer regarded him as substantially limited in working:

> Proving that an employee is regarded as disabled in the major life activity of working takes a plaintiff to the farthest reaches of the ADA. It is a question embedded almost entirely in the employer's subjective state of mind. Thus, proving the case becomes extraordinarily difficult. Not only must a plaintiff demonstrate that an employer thought he was disabled, he must also show that the employer thought that his disability would prevent him from performing a broad class of jobs. As it is safe to assume employers do not regularly consider the panoply of other jobs their employees could perform, and certainly do not often create direct evidence of such considerations, the plaintiff's task becomes even more difficult.

Ross v. Campbell Soup Co., 237 F.3d 701, 709 (6th Cir. 2001).

Plaintiff claims that York regarded him as disabled because: his supervisor sent him to the hospital on his last day of work; and York placed him on FMLA leave, short-term disability, and long-term disability. These arguments have no merit. Plaintiff has not carried his difficult burden simply by claiming that his supervisor sent him to the hospital because he was in pain. Obviously, the existence of pain does not necessarily, or even reasonably, give rise to an inference that the pain is caused by a disability. Nor does Plaintiff carry his burden with the argument regarding his receipt of benefits. *See Anderson v. Inland Paperboard and Packaging, Inc.*, 11 Fed. Appx. 432, 437-38 (6th Cir. 2001) (unpublished). In

Anderson, the plaintiff, in an attempt to establish that his employer regarded him as disabled, pointed to statements in his supervisor's deposition that the plaintiff was disabled enough to receive disability benefits under the collective bargaining agreement. *Id.* In dismissing this argument, the court in *Anderson* found that the supervisor was aware the standard for a disability under the collective bargaining agreement was different than the standard under the ADA. *Id.* at 438. Similarly here, Plaintiff has not shown that the standards for qualifying for short or long-term disability benefits or FMLA leave are the same or similar to the standard for a disability under the ADA.[6]

2. Performing the Job's Essential Functions

York claims that Plaintiff could not perform the essential functions of his job either with or without reasonable accommodations. York claims that Plaintiff was not medically released by his doctor to work until July 11, 2002, almost two years after his termination date (October 31, 2000).[7]

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[6] In fact, under the FMLA, an employee can take unpaid leave because of a "serious health condition" that makes the employee unable to perform the functions of the employee's position. *See* 29 U.S.C. § 2612(a)(D). The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility, or (B) continuing treatment by a health care provider. *See* 29 U.S.C. § 2611(11). Clearly, this standard is different and not similar to the ADA's standard for a disability, *i.e.*, a condition that renders an individual substantially limited in a major life activity.

[7] Plaintiff claims that Payton told him he would be terminated on May 1, 2001 (not his actual termination date of October 31, 2000), if he remained away from work on LTD for one full year.

Plaintiff asserts that he was able to perform the essential functions of the job with reasonable accommodations. The term "reasonable accommodation" may include: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, and other similar accommodations. 42 U.S.C. § 12111(9). The disabled individual bears the initial burden of proposing an accommodation and showing that such accommodation is objectively reasonable. *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996).

Plaintiff asserts that his inquiry into part-time work at York in August 2000 was a request for an accommodation. Plaintiff claims that the Valley View facility had a receptionist job available at the time of his inquiry, but offers no evidence that this position was a *part-time* position. As this Court previously discussed, Plaintiff has not established that York had part-time positions available. In fact, Plaintiff acknowledges that he did not know of any part-time employees at the Valley View facility during the ten years he was employed. York is not required to create a new position for Plaintiff or reassign him to a non-vacant position. *See Smith v. Ameritech,* 129 F.3d 857, 867 (6th Cir. 1997) (An employer is not required to assign an employee to a position that is not vacant); *see also Bratten v. SSI Svcs., Inc.*, 185

However, Plaintiff has not introduced evidence showing he was capable to return to work prior to May 1, 2001. Therefore, as York asserts, even assuming Plaintiff's assertion as true, Plaintiff has not shown that he would not have been terminated on May 31, 2001.

F.3d 625, 632 (6th Cir. 1999) (An employer is not required to create a new position to accommodate a disabled worker or to reallocate job duties in a manner that changes the essential functions of a job).

Plaintiff also asserts that he could have performed his former warehouseman job in some capacity with a reasonable accommodation such as tools. (Orzechowski Dep., p. 58.) However, Plaintiff has not presented any evidence that he sought to return to his former job or that he requested such an accommodation. In fact, aside from Plaintiff's inquiries into part-time work, he admits that he did not request an accommodation from York. *Id.* at 59.

Therefore, Plaintiff has not presented a genuine issue of material fact as to whether Plaintiff could have performed the essential functions of the job in question.

3. Adverse Employment Action

York asserts that it terminated Plaintiff pursuant to its legitimate, nondiscriminatory one-year termination policy, and not because Plaintiff was handicapped. York asserts that it has an extended disability policy in which it terminates employees who have been on disability leave extending beyond twelve consecutive months. Plaintiff does not challenge York's termination policy, but instead claims that York misled him about his termination date when Payton told him that he would be terminated one year after he began receiving *long-term* disability, *i.e.*, May 1, 2001 (and not one year after he went on disability leave, *i.e.*, October 31, 2000), if he remained away from work. However, Plaintiff has not introduced evidence showing he was capable to return to work prior to May 1, 2001. Therefore, as York asserts, even assuming Plaintiff's assertion as true, Plaintiff cannot

establish that he would not have been terminated on May 1, 2001, pursuant to York's policy. Moreover, this assertion does not establish York terminated Plaintiff, regardless of whether it occurred on October 31, 2000 or May 1, 2001, because of his alleged disability.[8]

Plaintiff also asserts that he attempted to return to work part-time in August 2000, well before either termination date, but York denied him a position. However, as this Court discussed in detail above, Plaintiff cannot show that York was required to hire Plaintiff on a part-time basis. *See, supra,* Performing the Job's Essential Functions Section. Therefore, Plaintiff has not established that York terminated him because he was handicapped.

C. Public Policy

Plaintiff alleges that York's termination of him violates public policy against handicap discrimination.

A cause of action may be brought for wrongful discharge in violation of public policy based on discrimination. *See Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134, 151 (1997). In order for the employee to establish a viable common law cause of action, the employee must show: (1) that a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law ("clarity element"); (2) that

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[8] The fact that York terminated employees on disability leave does not establish that York terminated him because he was disabled as Plaintiff has failed to show or allege that the disability standards for he FMLA, or short or long-term disability are the same as the standard under O.R.C. § 4112. *See, supra,* "Regarded as" Disabled subsection.

dismissing employees under circumstances like those involved would jeopardize the public policy ("jeopardy element"); (3) the employee's dismissal was motivated by conduct related to the public policy ("causation element"); and (4) the employer lacked overriding legitimate business justification for the dismissal ("overriding justification element"), *Id.* Public policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason prohibited by statute, *Id.* at 150-51; *see also Greeley v. Miami Valley Maintenance Contrs., Inc.,* 49 Ohio St. 3d 228 (1990).

Although an employer is prohibited from terminating, refusing to hire, or otherwise discriminating against an employee because of the employee's disability under O.R.C. § 4112.02, Plaintiff has not set forth a *prima facie* case against York for handicap discrimination. Therefore, public policy does not warrant an exception to the at-will doctrine because Plaintiff has not shown that he was terminated for a reason prohibited by statute. *See Kulch,* 78 Ohio St. 3d at 150-51; *see also Ekstrom v. Cuyahoga County Community College,* 150 Ohio App. 3d 169, 183 (2002) (Since the plaintiff has failed to establish her discrimination claims, she has not proved that her discharge jeopardized the public policy of the discrimination statute). In accordance with *Ekstrom*, Plaintiff has failed to meet the jeopardy element of the *Kulch* test since he failed to establish discrimination by York.

V. Conclusion

For the foregoing reasons, the Magistrate Judge recommends York's Motion for Summary Judgment (Doc. No. 28) be GRANTED.

/s/Nancy A. Vecchiarelli
U.S. Magistrate Judge

Date: December 3, 2004

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of this notice. Failure to file objections within the specified time may waive the right to appeal the District Court's order. ***See United States v. Walters,*** **638 F.2d 947 (6th Cir. 1981).** ***See also Thomas v. Arn,*** **474 U.S. 140 (1985),** ***reh'g denied,*** **474 U.S. 1111 (1986).**

APPENDIX E

RELEVANT STATUTORY PROVISION INVOLVED

TITLE 41. LABOR AND INDUSTRY
CHAPTER 4112. CIVIL RIGHTS COMMISSION

§ 4112.02. Unlawful discriminatory practices

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, national origin, disability, age, or ancestry, to do any of the following:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;

(2) Comply with a request from an employer for referral of applicants for employment if the request directly or indirectly indicates that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to do any of the following:

(1) Limit or classify its membership on the basis of race, color, religion, sex, national origin, disability, age, or ancestry;

(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, national origin, disability, age, or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, national origin, disability, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, personnel placement service, or labor organization, prior to employment or admission to membership, to do any of the following:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, disability, age, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, national origin, disability, age, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank, seeking to elicit information

regarding race, color, religion, sex, national origin, disability, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency of that government, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain that proof in the employer's personnel records and may use photographic or fingerprint identification for security purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, national origin, disability, age, or ancestry;

(5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, national origin, disability, age, or ancestry of that group;

(6) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, national origin, disability, age, or ancestry.

(F) For any person seeking employment to publish or cause to be published any advertisement that specifies or in any manner indicates that person's race, color, religion, sex, national origin, disability, age, or ancestry, or expresses a limitation or preference as to the race, color, religion, sex,

national origin, disability, age, or ancestry of any prospective employer.

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

(H) For any person to do any of the following:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, familial status, ancestry, disability, or national origin;

(2) Represent to any person that housing accommodations are not available for inspection, sale, or rental, when in fact they are available, because of race, color, religion, sex, familial status, ancestry, disability, or national origin;

(3) Discriminate against any person in the making or purchasing of loans or the provision of other financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, or any person in the making or purchasing of loans or the provision of other financial assistance that is secured by residential real estate, because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located, provided that the person,

whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to the person's principal business and not only as a part of the purchase price of an owner-occupied residence the person is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member of a married couple;

(7) Print, publish, or circulate any statement or advertisement, or make or cause to be made any statement or

advertisement, relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing accommodations, or relating to the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, that indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, familial status, ancestry, disability, or national origin, or an intention to make any such preference, limitation, specification, or discrimination;

(8) Except as otherwise provided in division (H)(8) or (17) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, familial status, ancestry, disability, or national origin in connection with the sale or lease of any housing accommodations or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations. Any person may make inquiries, and make and keep records, concerning race, color, religion, sex, familial status, ancestry, disability, or national origin for the purpose of monitoring compliance with this chapter.

(9) Include in any transfer, rental, or lease of housing accommodations any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant;

(10) Induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, familial status, or ethnic composition of the block, neighborhood, or other area

in which the housing accommodations are located, or induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that the presence or anticipated presence of persons of any race, color, religion, sex, familial status, ancestry, disability, or national origin, in the block, neighborhood, or other area will or may have results including, but not limited to, the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, familial status, or ethnic composition of the block, neighborhood, or other area;

(c) An increase in criminal or antisocial behavior in the block, neighborhood, or other area;

(d) A decline in the quality of the schools serving the block, neighborhood, or other area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or discriminate against any person in the terms or conditions of that access, membership, or participation, on account of race, color, religion, sex, familial status, national origin, disability, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (H) of this section;

(13) Discourage or attempt to discourage the purchase by a prospective purchaser of housing accommodations, by representing that any block, neighborhood, or other area has undergone or might undergo a change with respect to its religious, racial, sexual, familial status, or ethnic composition;

(14) Refuse to sell, transfer, assign, rent, lease, sublease, or finance, or otherwise deny or withhold, a burial lot from any person because of the race, color, sex, familial status, age, ancestry, disability, or national origin of any prospective owner or user of the lot;

(15) Discriminate in the sale or rental of, or otherwise make unavailable or deny, housing accommodations to any buyer or renter because of a disability of any of the following:

(a) The buyer or renter;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(15)(b) of this section.

(16) Discriminate in the terms, conditions, or privileges of the sale or rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of a disability of any of the following:

(a) That person;

(b) A person residing in or intending to reside in the

housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(16)(b) of this section.

(17) Except as otherwise provided in division (H)(17) of this section, make an inquiry to determine whether an applicant for the sale or rental of housing accommodations, a person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available, or any individual associated with that person has a disability, or make an inquiry to determine the nature or severity of a disability of the applicant or such a person or individual. The following inquiries may be made of all applicants for the sale or rental of housing accommodations, regardless of whether they have disabilities:

(a) An inquiry into an applicant's ability to meet the requirements of ownership or tenancy;

(b) An inquiry to determine whether an applicant is qualified for housing accommodations available only to persons with disabilities or persons with a particular type of disability;

(c) An inquiry to determine whether an applicant is qualified for a priority available to persons with disabilities or persons with a particular type of disability;

(d) An inquiry to determine whether an applicant currently uses a controlled substance in violation of section 2925.11 of the Revised Code or a substantively comparable municipal ordinance;

(e) An inquiry to determine whether an applicant at any time has been convicted of or pleaded guilty to any offense, an element of which is the illegal sale, offer to sell, cultivation, manufacture, other production, shipment, transportation, delivery, or other distribution of a controlled substance.

(18) (a) Refuse to permit, at the expense of a person with a disability, reasonable modifications of existing housing accommodations that are occupied or to be occupied by the person with a disability, if the modifications may be necessary to afford the person with a disability full enjoyment of the housing accommodations. This division does not preclude a landlord of housing accommodations that are rented or to be rented to a disabled tenant from conditioning permission for a proposed modification upon the disabled tenant's doing one or more of the following:

(i) Providing a reasonable description of the proposed modification and reasonable assurances that the proposed modification will be made in a workerlike manner and that any required building permits will be obtained prior to the commencement of the proposed modification;

(ii) Agreeing to restore at the end of the tenancy the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if it is reasonable for the landlord to condition permission for the proposed modification upon the agreement;

(iii) Paying into an interest-bearing escrow account that is in the landlord's name, over a reasonable period of time, a reasonable amount of money not to exceed the projected costs at the end of the tenancy of the restoration of

the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if the landlord finds the account reasonably necessary to ensure the availability of funds for the restoration work. The interest earned in connection with an escrow account described in this division shall accrue to the benefit of the disabled tenant who makes payments into the account.

(b) A landlord shall not condition permission for a proposed modification upon a disabled tenant's payment of a security deposit that exceeds the customarily required security deposit of all tenants of the particular housing accommodations.

(19) Refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit, including associated public and common use areas;

(20) Fail to comply with the standards and rules adopted under division (A) of section 3781.111 [3781.11.1] of the Revised Code;

(21) Discriminate against any person in the selling, brokering, or appraising of real property because of race, color, religion, sex, familial status, ancestry, disability, or national origin;

(22) Fail to design and construct covered multifamily dwellings for first occupancy on or after June 30, 1992, in accordance with the following conditions:

(a) The dwellings shall have at least one building

entrance on an accessible route, unless it is impractical to do so because of the terrain or unusual characteristics of the site.

(b) With respect to dwellings that have a building entrance on an accessible route, all of the following apply:

(i) The public use areas and common use areas of the dwellings shall be readily accessible to and usable by persons with a disability.

(ii) All the doors designed to allow passage into and within all premises shall be sufficiently wide to allow passage by persons with a disability who are in wheelchairs.

(iii) All premises within covered multifamily dwelling units shall contain an accessible route into and through the dwelling; all light switches, electrical outlets, thermostats, and other environmental controls within such units shall be in accessible locations; the bathroom walls within such units shall contain reinforcements to allow later installation of grab bars; and the kitchens and bathrooms within such units shall be designed and constructed in a manner that enables an individual in a wheelchair to maneuver about such rooms.

For purposes of division (H)(22) of this section, "covered multifamily dwellings" means buildings consisting of four or more units if such buildings have one or more elevators and ground floor units in other buildings consisting of four or more units.

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or

participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

(J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K) (1) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any nonprofit charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization, from limiting the sale, rental, or occupancy of housing accommodations that it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference in the sale, rental, or occupancy of such housing accommodations to persons of the same religion, unless membership in the religion is restricted on account of race, color, or national origin.

(2) Nothing in division (H) of this section shall bar any bona fide private or fraternal organization that, incidental to its primary purpose, owns or operates lodgings for other than a commercial purpose, from limiting the rental or occupancy of the lodgings to its members or from giving preference to its members.

(3) Nothing in division (H) of this section limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants

permitted to occupy housing accommodations. Nothing in that division prohibits the owners or managers of housing accommodations from implementing reasonable occupancy standards based on the number and size of sleeping areas or bedrooms and the overall size of a dwelling unit, provided that the standards are not implemented to circumvent the purposes of this chapter and are formulated, implemented, and interpreted in a manner consistent with this chapter and any applicable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations.

(4) Nothing in division (H) of this section requires that housing accommodations be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(5) Nothing in division (H) of this section pertaining to discrimination on the basis of familial status shall be construed to apply to any of the following:

(a) Housing accommodations provided under any state or federal program that have been determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended, to be specifically designed and operated to assist elderly persons;

(b) Housing accommodations intended for and solely occupied by persons who are sixty-two years of age or older;

(c) Housing accommodations intended and operated for occupancy by at least one person who is fifty-five years of age or older per unit, as determined under the "Fair Housing

Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended.

(L) Nothing in divisions (A) to (E) of this section shall be construed to require a person with a disability to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the person with a disability, other employees, the general public, or the facilities in which the work is to be performed, or to require the employment or training of a person with a disability in a job that requires the person with a disability routinely to undertake any task, the performance of which is substantially and inherently impaired by the person's disability.

(M) Nothing in divisions (H)(1) to (18) of this section shall be construed to require any person selling or renting property to modify the property in any way or to exercise a higher degree of care for a person with a disability, to relieve any person with a disability of any obligation generally imposed on all persons regardless of disability in a written lease, rental agreement, or contract of purchase or sale, or to forbid distinctions based on the inability to fulfill the terms and conditions, including financial obligations, of the lease, agreement, or contract.

(N) An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights.

A person who files a civil action under this division is barred, with respect to the practices complained of, from

instituting a civil action under section 4112.14 of the Revised Code and from filing a charge with the commission under section 4112.05 of the Revised Code.

(O) With regard to age, it shall not be an unlawful discriminatory practice and it shall not constitute a violation of division (A) of section 4112.14 of the Revised Code for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation that may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, including, but not limited to, a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of this section. However, no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual, because of the individual's age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 623, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 623, as amended.

(3) Retire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a

pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, of the employer of the employee, which equals, in the aggregate, at least forty-four thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 631, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 631, as amended;

(4) Observe the terms of any bona fide apprenticeship program if the program is registered with the Ohio apprenticeship council pursuant to sections 4139.01 to 4139.06 of the Revised Code and is approved by the federal committee on apprenticeship of the United States department of labor.

(P) Nothing in this chapter prohibiting age discrimination and nothing in division (A) of section 4112.14 of the Revised Code shall be construed to prohibit the following:

(1) The designation of uniform age the attainment of which is necessary for public employees to receive pension or other retirement benefits pursuant to Chapter 145., 742., 3307., 3309., or 5505. of the Revised Code;

(2) The mandatory retirement of uniformed patrol officers of the state highway patrol as provided in section 5505.16 of the Revised Code;

(3) The maximum age requirements for appointment as a patrol officer in the state highway patrol established by section 5503.01 of the Revised Code;

(4) The maximum age requirements established for original appointment to a police department or fire department

in sections 124.41 and 124.42 of the Revised Code;

(5) Any maximum age not in conflict with federal law that may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustees for original appointment as a police officer or firefighter;

(6) Any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal ordinance, or resolution of a board of township trustees pertaining to police officers and firefighters;

(7) Until January 1, 1994, the mandatory retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure, at an institution of higher education as defined in the "Education Amendments of 1980," 94 Stat. 1503, 20 U.S.C.A. 1141(a).

(Q) (1) (a) Except as provided in division (Q)(1)(b) of this section, for purposes of divisions (A) to (E) of this section, a disability does not include any physiological disorder or condition, mental or psychological disorder, or disease or condition caused by an illegal use of any controlled substance by an employee, applicant, or other person, if an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee acts on the basis of that illegal use.

(b) Division (Q)(1)(a) of this section does not apply to an employee, applicant, or other person who satisfies any of the following:

(i) The employee, applicant, or other person has successfully completed a supervised drug rehabilitation

program and no longer is engaging in the illegal use of any controlled substance, or the employee, applicant, or other person otherwise successfully has been rehabilitated and no longer is engaging in that illegal use.

(ii) The employee, applicant, or other person is participating in a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance.

(iii) The employee, applicant, or other person is erroneously regarded as engaging in the illegal use of any controlled substance, but the employee, applicant, or other person is not engaging in that illegal use.

(2) Divisions (A) to (E) of this section do not prohibit an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee from doing any of the following:

(a) Adopting or administering reasonable policies or procedures, including, but not limited to, testing for the illegal use of any controlled substance, that are designed to ensure that an individual described in division (Q)(1)(b)(i) or (ii) of this section no longer is engaging in the illegal use of any controlled substance;

(b) Prohibiting the illegal use of controlled substances and the use of alcohol at the workplace by all employees;

(c) Requiring that employees not be under the influence of alcohol or not be engaged in the illegal use of any controlled substance at the workplace;

(d) Requiring that employees behave in conformance with the requirements established under "The Drug-Free Workplace Act of 1988," 102 Stat. 4304, 41 U.S.C.A. 701, as amended;

(e) Holding an employee who engages in the illegal use of any controlled substance or who is an alcoholic to the same qualification standards for employment or job performance, and the same behavior, to which the employer, employment agency, personnel placement service, labor organization, or joint labor-management committee holds other employees, even if any unsatisfactory performance or behavior is related to an employee's illegal use of a controlled substance or alcoholism;

(f) Exercising other authority recognized in the "Americans with Disabilities Act of 1990," 104 Stat. 327, 42 U.S.C.A. 12101, as amended, including, but not limited to, requiring employees to comply with any applicable federal standards.

(3) For purposes of this chapter, a test to determine the illegal use of any controlled substance does not include a medical examination.

(4) Division (Q) of this section does not encourage, prohibit, or authorize, and shall not be construed as encouraging, prohibiting, or authorizing, the conduct of testing for the illegal use of any controlled substance by employees, applicants, or other persons, or the making of employment decisions based on the results of that type of testing.

(2)

No. 05-1651

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAY E. ORZECHOWSKI

Petitioner,

v.

YORK INTERNATIONAL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT YORK INTERNATIONAL CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit heightened the evidentiary requirements to survive summary judgment on disability discrimination claims under § 4112.02 of the Ohio Revised Code by (1) requiring a plaintiff alleging a substantial limitation of the major life activity of working to present evidence that he is precluded from a broad range or class of jobs or (2) by requiring a plaintiff alleging a disability due to a "record of impairment" to present evidence of a substantial limitation of a major life activity.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent YORK International Corporation states that it is a wholly owned subsidiary of Johnson Controls International which is publicly traded on the New York Stock Exchange as JCI.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 29.6 Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	vi
Jurisdiction	1
Statutory Provisions Involved	1
Introduction	1
Statement of the Case	2
Reasons for Denying the Petition	6
I. THE CIRCUIT SPLIT ALLEGED BY PETITIONER DOES NOT EXIST	6
A. This Court Has Defined The Term "Substantially Limits" In Relation To The Major Life Activity Of Working As Being Precluded From A Class Of Jobs Or Broad Range Of Jobs In Various Classes	7
B. The First, Third And Sixth Circuits Uniformly Apply This Court's Definition Of "Substantially Limits"	8
C. The Cases Cited By Petitioner Do Not Evidence A Circuit Split	9
i. The First Circuit Cases Cited By Petitioner Are Inapposite And Do Not Evidence A Circuit Split	9
ii. The Third Circuit Case Cited By Petitioner Does Not Evidence A Circuit Split	10

TABLE OF CONTENTS – Continued

Page

D. Courts In Other Circuits Do Not Allow Plaintiffs Who Merely Establish A Physical Impairment To Proceed To Trial 12

E. The First, Third And Sixth Circuits Utilize The Same Test When Reviewing "Record Of Impairment" Claims 13

II. PETITIONER FAILED TO PRESENT EVIDENCE SUFFICIENT TO OVERCOME RESPONDENT'S MOTION FOR SUMMARY JUDGMENT 16

Conclusion 17

APPENDIX:

Appendix A *Farkas v. Carpenter Technology Corp.*, Civil Action No. 05-CV-2741, 2006 U.S. Dist. LEXIS 9170 (E.D. Pa. March 6, 2006) (unpublished) .....App. 1

Appendix B *Olds v. U.P.S., Inc.*, 127 Fed. Appx. 779 (6th Cir. 2005) (unpublished) .....App. 16

Appendix C *Sebest v. Campbell City Sch. Dist. Bd. Of Educ.*, 94 Fed. Appx. 320 (6th Cir. 2004) (unpublished) .....App. 26

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alberson's Inc. v. Kirkingburg, 527 U.S. 555 (1999) 13

Clemente v. Executive Airlines, Inc., 213 F.3d 25 (1st Cir. 2000) 15

Farkas v. Carpenter Technology Corp., Civil Action No. 05-CV-2741, 2006 U.S. Dist. LEXIS 9170 (E.D. Pa. March 6, 2006) 15

LeBron-Torres v. Whitehall Labs., 251 F.3d 236 (1st Cir. 2001) 9

Lowry v. Cabletron Systems, Inc., 973 F. Supp. 77 (D. N.H. 1997) 9, 10, 16

McKay v. Toyota Motor Mfg., Inc., 110 F.3d 369 (6th Cir. 1997) 9, 10, 11, 12

Murphy v. UPS, 527 U.S. 516 (1999) 8

Olds v. UPS, Inc., 127 Fed. Appx. 779 (6th Cir. 2005) 15

Quint v. A.E. Staley Mfg. Co., 172 F.3d 1 (1st Cir. 1999) 9, 10, 16

Sebest v. Campbell City Sch. Dist. Bd. of Educ., 94 Fed. Appx. 320 (6th Cir. 2004) 15

Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) 7

Tice v. Centre Area Trans. Auth., 247 F.3d 506 (3d Cir. 2001) 8, 14

Toyota Motor Mfg., Ky. Inc. v. Williams, 534 U.S. 184 (2002) 12

Whitfield v. Pathmark Stores, Inc., 39 F. Supp. 434 (D. Del. 1999) 10, 11, 12, 13, 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

28 U.S.C. § 1254 1

42 U.S.C. § 12102(2) 1, 14

29 C.F.R. § 1630.2 ..... 1, 8, 11, 14, 16

OHIO REV. CODE § 4112.02 ..... 1, 4, 5

RULES

SUPREME COURT RULE 29.6 ii

FED. R. EVID. 201(b)(2) 4, 5, 6

FED. R. CIV. PRO. 12(b)(6) 10

FED. R. CIV. PRO. 56(C) 16

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254. This case was decided by the Sixth Circuit Court of Appeals based on diversity jurisdiction and does not raise a federal question. Rather, the Sixth Circuit's application of federal law principles to a state statute is at issue.

STATUTORY PROVISIONS INVOLVED

In addition to § 4112.02 of the Ohio Revised Code, cited by Petitioner, 42 U.S.C. § 12102(2), and 29 C.F.R. § 1630.2 are germane to this matter.

INTRODUCTION

Because this case involves the consistent and correct application of well-settled law, it is a textbook example of a matter that does not warrant this Court's review. Throughout this litigation, Petitioner has repeatedly failed to present evidence that he is disabled within the meaning of § 4112.02 of the Ohio Revised Code. Now, in a last-ditch attempt to salvage his case, he asserts the Sixth Circuit utilized an inappropriate evidentiary standard in reviewing the district court's decision to grant Respondent's motion for summary judgment. However, in requiring that he demonstrate a substantial limitation of the major life activity of working by presenting evidence that he was

precluded from a broad range or class of jobs, the Sixth Circuit and the district court adhered to well-settled and consistently applied principles established by this Court.

Petitioner's argument that this requirement created a circuit split is without merit. First, while the Sixth Circuit applied Americans with Disabilities Act ("ADA") principles, this case was not brought under the ADA. Rather, Petitioner's claim was brought and decided under Ohio law. Second, the Sixth Circuit's application of ADA principles and Equal Employment Opportunity Commission ("EEOC") regulations which require a showing of preclusion from a broad range or class of jobs to Petitioner's state law claims did not create a split between the First and Third Circuits and the Sixth Circuit. Rather, a review of applicable case law demonstrates the First, Third and Sixth Circuits uniformly apply these principles and regulations. Likewise, contrary to Petitioner's claims, the First, Third and Sixth Circuits all require evidence of a substantial limitation of a major life activity to demonstrate a disability due to a "record of impairment."

For these reasons, this Court should deny the Petition.

STATEMENT OF THE CASE

Respondent employed Petitioner at its Valley View, Ohio facility as a warehouseman. Pet. App. 16a. His duties included preparing UPS and Airborne packages, coordinating inbound freight, pulling orders from trucks, customer pickups, imputing orders, answering customer questions and minor maintenance. *Id.* On August 25, 1999, Petitioner injured his back while at work. *Id.* Despite his

injury, he continued to work his regular duties and hours until approximately October 8, 1999, when his doctor diagnosed a herniated disk and indicated he could not work. *Id.* Petitioner returned to work on approximately October 25, 1999 and worked through October 27, 1999. *Id.* Petitioner was placed on leave and did not return to work after this time.[1] *Id.*

Respondent's leave policy allows an employee to take up to twelve consecutive months of leave. Pet. App. 17a. If an employee's leave extends beyond the twelve months allowed by the policy, the employee's employment is terminated. *Id.* On October 18, 2000, Petitioner was advised that, because he would be absent from work for twelve consecutive months as of October 28, 2000, he would be receiving a termination letter. *Id.* In accordance with its leave policy, Respondent terminated Petitioner's employment effective October 31, 2000.[2] Pet. App. 18a.

On July 8, 2002, almost two years after his termination, Petitioner contacted Respondent seeking part-time work through the Part-Time Work Incentive Program administered by Aetna, Respondent's third-party insurance

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[1] On October 28, 1999, Respondent placed Petitioner on leave under the Family and Medical Leave Act. Pet. App. 16a. Petitioner initially received eight weeks of salary continuation and later short-term disability benefits. *Id.* In February 2000, Petitioner had back surgery. *Id.* Petitioner began receiving long-term disability benefits on May 1, 2000. *Id.*

[2] Petitioner alleges he attempted to return to work in August 2000 by inquiring about part-time employment. Pet. App. 17a. Petitioner was informed that no part-time positions were available. *Id.* However, even had a position been available, because he had not been released by his doctor to return to work, Petitioner could not have been hired. Pet. App. 30a.

carrier. Pet. App. 18a. Under this program, an individual who is medically released to work may work part-time with ***any employer*** and continue to receive long-term disability benefits. *Id.*

Respondent informed Petitioner that, although he could work part-time for any employer, part-time employment with Respondent was possible under certain circumstances. Pet. App. 18a. To be considered for a part-time position with Respondent, Petitioner was advised he must be medically released to return to work and a part-time position had to be available. *Id.* Petitioner was medically released to work on July 11, 2002. Pet. App. 30a. However, because no part-time positions were available, Respondent did not re-hire Petitioner.[3] Pet. App. 18a. Since October 2002, Petitioner has worked as a projectionist at a movie theater. Pet. App. 28a.

On October 25, 2002, Petitioner filed a Complaint in the Cuyahoga County Court of Common Pleas which asserted claims for breach of contract, promissory estoppel, violation of good faith and fair dealing, intentional and negligent infliction of emotional distress, discharge in violation of public policy and handicap discrimination in violation of Ohio Revised Code § 4112.02.[4] Respondent removed the case to the United States District Court for

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[3] The lack of part-time positions was not surprising as no part-time positions were available during Petitioner's ten-year employment with Respondent. Pet. App. 23a.

[4] As the docket in this matter is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," this Court may take judicial notice of it. FED. R. EVID. 201(b)(2). In the interest of brevity, Respondent will not continue to recite the text of the rule each time it cites to the docket of this case but instead will merely cite to the judicial notice rule.

the Northern District of Ohio based on diversity of citizenship.[5] The district court granted Respondent's motion to dismiss Petitioner's claims of promissory estoppel, intentional and negligent infliction of emotional distress and violation of good faith and fair dealing.[6] Petitioner's claims for breach of contract, discharge in violation of public policy and disability discrimination survived dismissal.

Petitioner claimed to be disabled within the meaning of Ohio Revised Code § 4112.02 due to a substantial limitation of the major life activity of working.[7] Pet. App. 26a. Petitioner asserted his back condition limited his ability to do repetitive work because he needed to "sit down for a little while" and "stand up for a little while" and needed to keep moving. *Id.* Dr. James Faremouth opined Petitioner could not perform a job involving repetitive bending from the waist to the floor or a job that involved heavy lifting of more than twenty pounds on a regular or occasional basis. Pet. App. 27a.

After the completion of discovery, Respondent filed a motion for summary judgment on the remaining claims.[8] On December 3, 2004, the Magistrate Judge entered a Report and Recommendation recommending that Respondent's motion for summary judgment be granted. Pet. App. D. The Magistrate Judge found Petitioner's evidence, as cited above, to be insufficient to raise a genuine issue of material fact regarding whether he was disabled due to a

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[5] FED. R. EVID. 201(b)(2).

[6] FED. R. EVID. 201(b)(2).

[7] As Petitioner's other causes of action are not at issue here, the basis of these claims will not be discussed.

[8] FED. R. EVID. 201(b)(2).

substantial limitation of the major life activity of working. Pet. App. 28a. The district court adopted the Magistrate Judge's Report and Recommendation in its entirety on February 3, 2005. Pet. App. B; Pet. App. C. Petitioner timely appealed the decision to the United States Court of Appeals for the Sixth Circuit.[9] After briefing and oral argument, the Sixth Circuit affirmed the decision of the district court. Pet. App. A. This Petition followed.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT SPLIT ALLEGED BY PETITIONER DOES NOT EXIST.

This Court should reject the Petition because the "split" alleged by Petitioner does not exist. Contrary to Petitioner's arguments, the Sixth Circuit does not require an individual alleging a substantial limitation of the major life activity of working to produce more evidence to survive summary judgment than is required in the First and Third Circuits. Rather, consistent with other circuits, the Sixth Circuit merely requires such a plaintiff to present evidence that would allow a reasonable jury to find that he cannot perform a class of jobs or a broad range of jobs in various classes. Similarly, in line with the First and Third Circuits, the Sixth Circuit requires an individual claiming a disability due to a "record of impairment" to demonstrate both a "record" of the impairment and that the impairment "substantially limits a major life activity." Thus, Petitioner's assertion that a circuit split exists is erroneous.

[9] FED. R. EVID. 201(b)(2).

Further, Petitioner did not allege discrimination based on a "record of impairment" with the district court, nor did he argue on appeal that the district court somehow erred in not addressing this issue. Pet. App. A; Pet. App. D. Rather, as the Sixth Circuit noted, Petitioner did not cite any legal error on the part of the district court. Pet. App. 8a. Therefore, Petitioner should not be given the opportunity to seek review based on an alleged "circuit split" regarding an issue that he never raised.

A. This Court Has Defined The Term "Substantially Limits" In Relation To The Major Life Activity Of Working As Being Precluded From A Class Of Jobs Or Broad Range Of Jobs In Various Classes.

The fundamental premise of Petitioner's argument in support of *certiorari* is flawed. In fact, this Court has defined the term "substantially limits" as it applies to the major life activity of working. In *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 491 (1999), when addressing the major life activity of working, this Court stated that the statutory phrase " 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." This Court then explained:

> To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of

> different types of jobs are available, one is not precluded from a broad range of jobs.

Id. at 492.

This definition comports with the regulations promulgated by the EEOC. In its regulations, the EEOC defines "substantially limits" in the context of the major life activity of working as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes compared to the average person having comparable training, skills or abilities." 29 C.F.R. § 1630.2(j)(3)(i). The EEOC further notes that the "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id. See also Murphy v. UPS*, 527 U.S. 516 (1999) (assuming, without deciding, the validity of the EEOC regulation). Thus, this Court has provided ample guidance regarding the definition of "substantially limits" as it applies to the major life activity of working.

B. The First, Third And Sixth Circuits Uniformly Apply This Court's Definition Of "Substantially Limits."

Not only has this Court clearly defined "substantially limits," the First, Third and Sixth Circuits all consistently adhere to this definition, requiring an ADA plaintiff alleging a substantial limitation of the major life activity of working to present evidence that he or she is precluded from a class or broad range of jobs in various classes to survive summary judgment. *See Tice v. Centre Area Trans. Auth.*, 247 F.3d 506 (3d Cir. 2001) (holding a plaintiff's inability to drive a bus did not preclude him from a broad class of jobs as necessary to demonstrate a substantial

limitation of the major life activity of working because evidence demonstrated the plaintiff's ability to engage in other employment); *Lebron-Torres v. Whitehall Labs.*, 251 F.3d 236 (1st Cir. 2001) (finding a plaintiff with a back injury did not demonstrate a substantial limitation on the major life activity of working because she continued to work full-time at her manufacturing job after her injury and later almost full-time as a hairstylist); *McKay v. Toyota Motor Mfg., Inc.*, 110 F.3d 369 (6th Cir. 1997) (holding the plaintiff did not produce sufficient evidence to survive summary judgment because evidence only demonstrated her inability to perform a narrow range of jobs requiring repetitive motion, not a broad class of jobs). Thus, Petitioner's alleged circuit split regarding the "substantially limits" definition is nonexistent.

C. The Cases Cited By Petitioner Do Not Evidence A Circuit Split.

Although Petitioner alleges the absence of a definition of "substantial limitation" with respect to the major life activity of working has created a circuit split, he does not set forth any cases supporting this proposition.

i. The First Circuit Cases Cited By Petitioner Are Inapposite And Do Not Evidence A Circuit Split.

The cases relied on by Petitioner to evidence a split of authority between the First and Sixth Circuits are inapposite. First, neither *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1 (1st Cir. 1999) nor *Lowry v. Cabletron Systems, Inc.*, 973 F. Supp. 77 (D. N.H. 1997), address the First Circuit standard for demonstrating a "record of impairment"

under the ADA. Second, neither *Quint* nor *Lowry* address the evidence necessary to survive summary judgment in the First Circuit as neither case was decided on summary judgment. Rather, in *Quint*, the defendant appealed the district court's finding that it had discriminated against the plaintiff in violation of the ADA. *Quint*, 172 F.3d at 5. In *Lowry*, the district court denied the defendant's motion to dismiss the plaintiff's ADA claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Lowry*, 973 F. Supp. at 84. Thus, neither *Quint* nor *Lowry* support Petitioner's contention that a circuit split exists between the First and Sixth Circuits regarding "record of impairment" or the evidentiary standard required for an ADA plaintiff to survive summary judgment.[10]

ii. The Third Circuit Case Cited By Petitioner Does Not Evidence A Circuit Split.

In support of the contention that a circuit split exists between the Third and Sixth Circuits, Petitioner relies solely on *Whitfield v. Pathmark Stores, Inc.*, 39 F. Supp. 434 (D. Del. 1999). In *Whitfield*, the plaintiff argued she was disabled under the ADA because she had "an impairment that 'substantially limit[ed] one or more of [her] major life activities' or, in the alternative, because she '[had] a record of such impairment.'" *Id.* at 436. The court first addressed whether the impairment substantially

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[10] Interestingly, both *Quint* and *Lowry* utilize the court's holding in *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) – the Sixth Circuit case Petitioner claims is at the heart of the "circuit split." *Quint*, 172 F.3d at 12-13; *Lowry*, 973 F. Supp. at 81.

limited one or more of the plaintiff's major life activities.[11] *Id.* Regarding the major life activity of working, the court applied the EEOC definition of "substantial limitation" and found that evidence from the plaintiff's vocational expert that her job options were "greatly diminished," was sufficient to survive summary judgment. *Id.* at 440-43, *citing* 29 C.F.R. § 1630.2(j)(3).

The court next considered whether the plaintiff had presented sufficient evidence of a "record of impairment" to survive summary judgment. *Id.* at 444. In concluding that sufficient evidence existed, the court relied on two factors: (1) evidence the defendant knew the plaintiff's medical restrictions were permanent when it began its allegedly discriminatory treatment and (2) the court's previous finding that the restrictions caused by the plaintiff's physical impairment could substantially limit a major life activity. *Id.* at 444-45. Thus, the court also allowed the "record of impairment" claim to proceed to trial. *Id.*

Although Petitioner asserts that comparing *Whitfield* to *McKay v. Toyota Motor Mfg. U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) evidences a circuit split, the basis for this assertion is unclear. In *McKay*, like *Whitfield*, there was no dispute regarding the existence of a physical impairment. *Id.* at 371. Rather, the district court in *McKay* granted the defendant's motion for summary judgment as it concluded that the plaintiff's carpal tunnel syndrome did not substantially limit the major life activity of working. *Id.* The district court noted that "a diagnosis of carpal

[11] It was uncontested that the plaintiff's back injury constituted a "physical impairment." *Id.* at 436.

tunnel syndrome, by itself, [is] insufficient to raise a genuine issue of material fact concerning whether plaintiff was disabled within the contemplation of the ADA." *Id.* Unlike *Whitfield*, the *McKay* plaintiff did not set forth sufficient evidence of a "substantial limitation of the major life activity of working" to raise an issue of material fact. *Id.* The Sixth Circuit, utilizing the same EEOC regulations as the *Whitfield* Court, affirmed this decision. *Id.* at 371-73. Because the *McKay* plaintiff did not allege discrimination based on a "record of impairment", the court did not address the issue. Thus, comparing *Whitfield* to *McKay* does not evidence a circuit split.

D. Courts In Other Circuits Do Not Allow Plaintiffs Who Merely Establish A Physical Impairment To Proceed To Trial.

Petitioner erroneously asserts that, in "the First and Third Circuit Court of Appeals, plaintiffs who are able to establish physical impairments are able to proceed to trial in the district courts."[12] Pet. at 5. This statement runs contrary to this Court's well-settled precedent. In *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), this Court found:

> It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those 'claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the

[12] As previously noted, Petitioner has waived any "record of impairment" argument by failing to raise this issue with the district court or Sixth Circuit.

> limitation [caused] by their impairment' in terms of their own experience.

Id. at 198, *quoting Alberson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999). Petitioner also asserts that, in the First and Third Circuits, ADA claims will survive summary judgment if the plaintiff produces evidence that he or she has a "record of disability." Pet. at 4-5. However, none of the cases cited by Petitioner support this proposition. Rather, as discussed below, a review of case law shows courts in the First and Third Circuits do not allow cases to proceed to trial simply because an individual has presented records documenting a "physical impairment."

E. The First, Third And Sixth Circuits Utilize The Same Test When Reviewing "Record Of Impairment" Claims.

Petitioner's assertion of a circuit split regarding the evidence required to survive summary judgment on a "record of impairment" claim is based on a misreading of *Whitfield*. Petitioner seems to assert that a "record of impairment," standing alone, is evidence that will allow an ADA plaintiff to survive summary judgment. This assertion is contrary to the ADA which defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of ***such an impairment*** [an impairment that substantially limits one or more of the major life activities]; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (emphasis added). Under the plain language of the statute, it is insufficient to demonstrate a "record of impairment"; rather, the individual must also demonstrate that the impairment in the record substantially limits a major life activity.

The EEOC further amplifies this point in its regulations which state that an individual has a "record of impairment" when he or she "has a history of, or has been misclassified as having, a mental or physical impairment that ***substantially limits one or more major life activities***." 29 C.F.R. § 1630.2(k) (emphasis added). As these regulations make clear, the recorded impairment must be one that substantially limits a major life activity.

Contrary to Petitioner's assertion, the First, Third and Sixth Circuits all apply the statute and regulations in this manner. In *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506 (3rd Cir. 2001), the court examined a claim based on the "record of disability" prong of the ADA and stated:

> In the alternative, Tice submits that he has a "record of disability" based on his back injuries. This contention fails for the same reason that we hold Tice is not currently disabled. ***A plaintiff attempting to prove the existence of a "record" of disability must still demonstrate that the recorded impairment is a "disability" within the meaning of the ADA.*** Tice has only presented evidence that his impairment limited his ability to drive a bus – ***once again, because an impairment that limits only bus driving is not a "disability," Tice has not demonstrated the existence of a record of disability***.

Id. at 513 (emphasis added). *See also Farkas v. Carpenter Technology Corp.*, Civil Action No. 05-CV-2741, 2006 U.S. Dist. LEXIS 9170 (E.D. Pa. March 6, 2006) (unpublished) (holding the plaintiff's record of having suffered a stroke insufficient to establish a "record of impairment" as there was no evidence his ability to work was substantially limited).

Similarly, in *Clemente v. Executive Airlines, Inc.*, 213 F.3d 25, 33 (1st Cir. 2000), the court held the plaintiff failed to establish a "record of impairment" because there was no evidence of an impairment that substantially limited a major life activity. Likewise, in *Sebest v. Campbell City Sch. Dist. Bd. Of Educ.*, 94 Fed. Appx. 320, 327 (6th Cir. 2004) (unpublished), the court held the plaintiff did not establish a "record of impairment." As in this case, the *Sebest* plaintiff proceeded under a misinterpretation of the requirements to demonstrate a "record of impairment." The court noted:

> While Sebest has presented evidence to show that he has suffered from leukemia in the past, he has not presented evidence demonstrating that he has a record of an impairment that substantially limits a major life activity. Sebest appears to assume that by having leukemia, he necessarily has a record of a disability. This understanding, however, is in conflict with the language of the ADA.

Id. See also Olds v. UPS, Inc., 127 Fed. Appx. 779 (6th Cir. 2005) (unpublished) (holding plaintiff did not establish a record of impairment because there was no evidence of a substantial limitation of the major life activity of working). Thus, there is no evidence to support Petitioner's contention that a circuit split exists with respect to this issue.

II. PETITIONER FAILED TO PRESENT EVIDENCE SUFFICIENT TO OVERCOME RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

Petitioner's claims failed because he did not present evidence of a substantial limitation of the major life activity of working – not because of an illusory circuit split or error on the part of the Sixth Circuit. As previously noted, to survive summary judgment, an ADA plaintiff must present evidence demonstrating a substantial limitation of a major life activity. When the major life activity is working, a plaintiff must demonstrate that he was precluded from occupying a class or broad range of jobs in various classes as compared to the average person with similar skills, training and abilities. 29 C.F.R. § 1630.2(j)(3)(i). Unless such a showing is made, summary judgment is appropriate. FED. R. CIV. PRO. 56(C).

Here, Petitioner alleged a substantial limitation of the major life activity of working based entirely on: (1) Dr. Faremouth's diagnosis of chronic lumbar radiculopathy – post surgical therapy lumbar spine which limited his ability to bend repeatedly from the waist or regularly lift more than twenty pounds; and (2) his own testimony that due to his back injury, he needs to "sit down for a little while" and "stand up for a little while" and needs to keep moving. Pet. App. 26a-27a. Unlike the situation in *Whitfield*, *Quint* and *Lowry*, Petitioner did not present any evidence in the form of expert testimony or otherwise that he was precluded from a class of jobs or broad range of jobs in various classes. Indeed, Petitioner has been employed since shortly after being medically released to return to work. Pet. App. 28a. Thus, the district court did not err in granting Respondent's motion for summary judgment. In upholding the district court, the Sixth Circuit noted that

Petitioner did not "cite any legal error in the district court's determination, nor [did] he allege that there [were] disputed issues of fact." Pet. App. 8a. Thus, the outcome of this Petition will not alter the disposition of this case.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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July 28, 2006

APPENDIX A

DAVID FARKAS v. CARPENTER TECHNOLOGY CORP.

CIVIL ACTION, NO. 05-CV-2741

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2006 U.S. Dist. LEXIS 9170;
17 Am. Disabilities Cas. (BNA) 1831

March 8, 2006, Decided
March 8, 2006, Filed; March 9, 2006, Entered

COUNSEL: For DAVID FARKAS, Plaintiff: DONALD P. RUSSO, DONALD P. RUSSO, ESQUIRE, BETHLEHEM, PA.

For CARPENTER TECHNOLOGY CORPORATION, Defendant: JOSEPH P. HOFMANN, STEVENS & LEE, LANCASTER, PA.

JUDGES: R. Barclay Surrick, Judge.

OPINION BY: R. Barclay Surrick

OPINION:

MEMORANDUM & ORDER

SURRICK, J.

March 8, 2006.

Presently before the Court is Defendant's Motion For Summary Judgment (Doc. No. 7). For the following reasons, Defendant's Motion will be granted.

I. BACKGROUND

A. Facts

Plaintiff David Farkas worked as a metallurgist for Defendant Carpenter Technology Corporation ("Carpenter") since 1982. On May 28, 2001, Plaintiff suffered a stroke, which caused him to be hospitalized for approximately one week. Plaintiff then applied for and was granted leave under the Family and Medical Leave Act ("FMLA"). He returned to work on July 5, 2001. At first, Plaintiff's physician restricted Plaintiff's work schedule to three days per week, to be spent in the office only and not in the steel mill. On August 22, 2001, his physician increased his work schedule to four days per week. Plaintiff was permitted to work with these restrictions. On October 12, 2001, Plaintiff's physician lifted all restrictions on Plaintiff's work schedule. From October 12, 2001 until his termination on November 17, 2003, Plaintiff was able to perform his job at Carpenter without restriction.

In his 2002 and 2003 annual performance reviews, Plaintiff received criticisms related to his job performance. (Farkas Dep. at Exs. 11-12.) Some of these criticisms were similar to criticisms that Plaintiff had received in his 1998, 1999, and 2000 performance reviews – reviews that Plaintiff had received before he suffered the stroke. These criticisms included concerns about his leadership skills, accountability, time management, and prioritizing. (Farkas Dep. at Exs. 8-10.) In October 2003, Plaintiff's immediate supervisor, John McGraw (hereinafter "McGraw"), had a meeting with Plaintiff regarding McGraw's concerns about Plaintiff's failure to complete ongoing projects in a timely fashion. (McGraw Dep. at 70-77; Farkas Dep. at 100-02; *id.* at Ex. 14.) At this meeting, Plaintiff indicated to McGraw that he did not want to stay in his current

position with Carpenter and that he wanted to be transferred to a less stressful job. (McGraw Dep. at 70-76; Farkas Dep. at 100-02.) Shortly after this meeting, McGraw discovered that Plaintiff had committed a significant error with regard to a product that Carpenter was manufacturing for Mercury Marine, one of Carpenter's major customers. (McGraw Dep. at 82-86.) This error caused the Defendant great concern related to keeping the client. It also cost Defendant approximately $18,000 to remedy the error. (*Id* . at 83-85; McElwee Dep. at 60-62.) Citing Plaintiff's declining job performance, failure to improve on noted deficiencies, and the aforementioned error with Mercury Marine, Carpenter terminated Plaintiff's employment on November 17, 2003. (Farkas Dep. at Ex. 15.)

B. Procedural History

On July 26, 2004, Plaintiff filed an administrative claim of discrimination with the Equal Employment Opportunity Commission ("EEOC") and with the Pennsylvania Human Relations

Commission ("PHRC").[1] On February 9, 2005, the EEOC sent Plaintiff a Dismissal and Notice of Right to

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[1] Plaintiff's complaint filed with the EEOC stated as follows:

> I began my employment with Carpenter Technology Corporation as a Associate Metallurgist, on 7/01/82, and have progressed to the level as a Senior Metallurgist. My annual reviews were mostly very favorable and I enjoyed my work. On May 28, 2001, I had suffered with a major medical condition which caused me to be out of work for a few days. I had a full recovery and returned back to work after approximately three months and I told John McGraw, Supervisor, that I was not limited in performing any aspects

(Continued on following page)

Sue letter advising that it was closing his file and advising Plaintiff of his right to sue. (Compl., Doc. No. 1 at Ex. B.)

In May 2005, Plaintiff filed suit in the Court of Common Pleas of Lehigh County, alleging that Defendant violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951 *et seq.* (Doc. No. 1 ¶¶ 16-18.) On June 7, 2005, Defendant filed a Notice of Removal in this Court. (*Id.*) Defendant has filed the instant Motion requesting summary judgment on both of Plaintiff's claims.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists

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> of my job. I gradually worked more and more hours upon my return to work until I was able to resume full time employment around December 2001. I noticed that my annual performance were lower after my illness, yet nothing was ever noted which caused me to have concerns about my employment, yet on November 17, 2003, John McGraw terminated me due to "performance concerns." No warnings (written or verbal) were ever given to me regarding poor performance prior to my termination. I strongly believe that the company perceived my condition as a financial risk and this was the real reason for my termination.
>
> I believe that I have been discriminated against because of my medical condition in violation of the Americans with Disabilities Act (ADA).

(Farkas Dep. at Ex. 16.)

only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the nonmoving party's legal position. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party carries this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (explaining that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). "The nonmoving party . . . 'cannot rely merely upon bare assertions, conclusory allegations or suspicion' to support its claim." *Townes v. City of Philadelphia*, Civ. A. No. 00-CV-138, 2001 U.S. Dist. LEXIS 6056, at *4 (E.D. Pa. May 11, 2001) (quoting *Fireman's Ins. Co. v. DeFresne*, 676 F.2d 965, 969 (3d Cir. 1982)). Rather, the party opposing summary judgment must go beyond the pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. When deciding a motion for summary judgment, the court must view facts and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995). However, we will not resolve factual disputes or make credibility determinations. *Siegel Transfer, Inc.*, 54 F.3d at 1127.

III. LEGAL ANALYSIS

Title I of the ADA prohibits discrimination by certain private employers against individuals with disabilities. Specifically, it provides that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). In order to make out a prima facie case under the ADA, a plaintiff must demonstrate: "(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of ~~the job, with~~ or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination." *Gaul v. Lucent Techs., Inc.*, 134 F.3d 576, 580 (3d Cir. 1998). Under the Act, a "disability" is defined as: "~~(A) a phys~~ical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment." 42 U.S.C. § 12102. Defendant contends that Plaintiff has failed to establish a prima facie case because Plaintiff has not established that he has a disability under any of the ADA's definitions.

A. Impairment That Substantially Limits a Major Life Activity

"It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002). The ADA requires that a

plaintiff must also offer evidence that the extent of the limitation caused by their impairment is substantial. *Id.* Plaintiff argues that his disability is his 2001 stroke, and that the stroke substantially limited his ability to work, a major life activity. (Pl.'s Mem. in Opp., Doc. No. 11 at 32.)

The Code of Federal Regulations specifically provides that to be disabled because of a substantial limitation on the major life activity of working, a plaintiff must be:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). When Plaintiff requested FMLA leave immediately after his stroke, Defendant granted his request. (Farkas Dep. at 33.) In addition, Plaintiff admitted in his deposition that on October 12, 2001, when he returned to a full five-day work schedule, he was able to perform all the functions of his metallurgist position. (*Id.*) Indeed, according to Plaintiff's Complaint, he made a "full recovery" upon his return to work. (Doc. No. 1 ¶ 9.) The only evidence of any kind that Plaintiff offers to demonstrate that his stroke substantially limited his ability to perform "either a class of jobs or a broad range of jobs" are the negative performance evaluations submitted by Plaintiff's supervisor after Plaintiff's stroke. (Doc. No. 11 at 32.) According to Plaintiff, these negative reviews clearly demonstrate "that Farkas' ability to work was impacted by his stroke." (*Id.*)

As an initial matter, we note that Plaintiff's own testimony undermines this argument, since he has disputed the accuracy of these very reviews. (Farkas Dep. at 70-99.) More importantly, these performance evaluations do not indicate that Plaintiff was limited in his ability to perform a class of jobs, let alone *substantially* limited. In the 2002 and 2003 evaluations, Plaintiff's supervisor indicated that he did not believe that Plaintiff had demonstrated enough leadership qualities, that he had time management problems, that he did not take responsibility for work, and that he was indecisive. (Farkas Dep. Exs. 11, 12.) There is no evidence that Plaintiff was unable to perform his job. This conclusion is underscored by Plaintiff's testimony that he was, in fact, able to carry out the essential functions of his position. In his deposition, Plaintiff admitted that only after he was terminated did he believe that his stroke had affected his ability to perform his job. (Farkas Dep. at 124-25, 127-28, 132-33.) After a thorough review of the record, we are satisfied that Plaintiff has failed to demonstrate that his stroke substantially limited his ability to work. Plaintiff went back to work shortly after his stroke and performed his job without limitation. *See Hill v. Steven Motors, Inc.*, 97 Fed. App'x 267, 276 (10th Cir. 2004) (plaintiff did not suffer substantial limitations on her ability to work after her stroke, despite having to undergo a "relearning process" and occasionally losing her balance); *Mitchell v. Girl Scouts of the U.S.A.*, 2003 U.S. Dist. LEXIS 20570, No. 98-CV-3730, 2003 WL 22705121, at *6-7 (S.D.N.Y. Nov. 17, 2003) (plaintiff's contentions that after her stroke she was unable to do a "substantial amount of walking," clean, or ride a bike did not meet criteria for disability under the ADA). Moreover, the deficiencies noted in his reviews existed both before and after his stroke. Accordingly,

Plaintiff has failed to establish that he suffers from a disability as that term is used in the ADA.

B. Record of Disability

Plaintiff has also failed to demonstrate that he has a record of having a disability. "Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k). Plaintiff contends that "Defendant had compiled a substantial record" of Plaintiff's disability, and that this record was well-known by Defendant. (Doc. No. 11 at 34.) It is undisputed that Defendant was aware that Plaintiff had a stroke. However, this alone is not sufficient to satisfy the requirements of the ADA. "A plaintiff attempting to prove the existence of a 'record' of disability still must demonstrate that the recorded impairment is a 'disability' within the meaning of the ADA." *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 513 (3d Cir. 2001). As discussed above, Plaintiff has not demonstrated that his stroke is a disability under the ADA because he has offered no proof that his ability to work was substantially limited. *See, e.g., Sorensen v. Univ. of Utah Hosp.*, 194 F.3d 1084, 1087 (10th Cir. 1999) (plaintiff did not meet standard for "record of disability" where plaintiff's hospitalization affected her for only a brief period and did not impact her ability to perform her job, because she did not suffer an impairment that substantially limits a major life activity).

Similarly, Plaintiff has offered no evidence that Defendant "misclassified" him as having an impairment that substantially limited his ability to work. Although Defendant was aware that Plaintiff had been hospitalized

for a stroke and subsequently granted his request for FMLA leave, there is no indication in the record that Plaintiff's supervisors believed him to be incapable of working. Plaintiff's own doctor lifted all restrictions on his work schedule in October 2001. After that, Plaintiff himself indicated that he had made a full recovery. He also testified that after October 2001, he did not need, nor did he request, a reasonable accommodation on account of his stroke. (Farkas Dep. at 33, 133.) Plaintiff's argument that Defendant misclassified him as disabled has no basis in fact.

Plaintiff attempts to use McGraw's statements in an October 27, 2003 memo to establish a "record" of disability. In that memo, McGraw refers to a discussion he had had with Plaintiff in which Plaintiff indicated that he wanted a less stressful position at Defendant. McGraw notes that "based on Dave's state of mind and the cited affect [sic] on his health together with his lack of performance in this position over the past several years, we should consider removing Dave from this position as soon as possible." (Farkas Dep. at Ex. 14.) Plaintiff's reliance on this statement is at best misguided and at worst, intentionally misleading. The health effects referenced in the memo are the stress-related issues that Plaintiff discussed with McGraw.[2] (Farkas Dep. at 111-12.) Plaintiff admits that he did not think these issues were related to his stroke, and that he did not tell McGraw that they were related to his

[2] Although Plaintiff does not make this argument, we also note that these stress-related health issues – "irregular heartbeat and chronic hemorrhoids" (Farkas Dep. at 111-12) – do not independently satisfy the ADA's definition of a disability, because there is no evidence that they substantially limited his ability to work. *See* 42 U.S.C. § 12102; 29 C.F.R. § 1630.2(j)(3)(i).

stroke. (Farkas Dep. at 111-14.) Without any evidence that Defendant had classified him as having a disability that substantially limited his work, Plaintiff has failed to satisfy the "record of such impairment" test.

C. "Regarded As" Disability

In order to prove that a defendant regarded a plaintiff as disabled, the plaintiff must prove that: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999). Defendant contends that there is no evidence indicating that Defendant believed he had an impairment that substantially limited his life activities. While Plaintiff argues that Defendant was aware that he had been hospitalized for a stroke, the Third Circuit has observed that "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action." *Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996). Plaintiff also claims that "Defendant considered Farkas as being unable to perform a wide range of jobs." (Doc. No. 11 at 35.) However, Plaintiff offers no support for this contention. To the extent that Plaintiff is suggesting that the fact that Defendant terminated Plaintiff's employment is evidence that Defendant considered Farkas unable to perform a wide range of jobs, this argument is circular in its reasoning and therefore unhelpful. *See Zalepa v. Cornerstone Tech., LLC*, 2005 U.S. Dist. LEXIS

34246, No. CV 03-1850, 2005 WL 3234314, at *7 (M.D. Pa. Nov. 30, 2005) ("The notion that defendant must have fired plaintiff because it regarded him as disabled and that it plainly regarded him as disabled because it fired him is attractive but circular – it lacks a causal antecedent.") (internal citations omitted).

Plaintiff relies on the Third Circuit's opinion in *Taylor v. Pathmark Stores*, 177 F.3d 180 (3d Cir. 1999), for the proposition that "in general, an employer's perception that an employee cannot perform a wide range of jobs suffices to make out a 'regarded as' claim." *Id.* at 188. However, in *Taylor* there was actual written evidence that the employer did not believe the plaintiff could perform *any* job for the employer even with accommodation, and as a result of this perception the employer terminated the plaintiff. *Id.* at 188. There is no such evidence in this case, nor does Plaintiff provide any evidence that his termination was due to such a misperception. The other cases cited by Plaintiff are distinguishable as well, in that those cases involve fact patterns in which the employer drastically restricted plaintiff's employment *as a result of* the employer's belief that plaintiff was unable to perform a range of jobs. *See, e.g., Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751 (3d Cir. 2004); *Best v. Shell Oil Co.*, 107 F.3d 544 (7th Cir. 1997); *Dacasin v. Bay Area Rapid Transit Dist.*, 1998 U.S. Dist. LEXIS 18626, No. C 97-0455, 1998 WL 827697 (N.D. Cal. Nov. 23, 1998). As previously discussed, the only restrictions that Defendant placed on Plaintiff's work as a result of his stroke were those requested by Plaintiff or Plaintiff's physician. After Plaintiff's physician indicated that Plaintiff could work full-time, there is no indication that Defendant regarded

Plaintiff as unable to perform a wide range of jobs.[3] Moreover, Plaintiff himself insisted that he had made a full recovery after his stroke. Under the circumstances, there is no support for Plaintiff's argument under the "regarded as" test for disability.

D. Nondiscriminatory Reasons

Even if one were to somehow conclude that Plaintiff has established a prime facie case of discrimination, one could not reasonably conclude that Defendant's proffered nondiscriminatory reasons for their actions were pretext for discrimination. Plaintiff's reviews over the years, even before his stroke, showed deficiencies in his performance. Although Defendant was satisfied with Plaintiff's job performance and generally considered him a good employee, the deficiencies were never really remedied by Plaintiff. Then, in 2003, Plaintiff made an error which could have cost Defendant a client and did cost Defendant $18,000 to remedy. This coupled with Plaintiff's lack of progress in his job performance and Plaintiff's expressed dissatisfaction with his job provide a nondiscriminatory explanation for Plaintiff's termination.[4] Plaintiff has

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[3] Plaintiff's allegation that Defendant took away his responsibilities for fuel injection customers because of his stroke does not meet the standard under the "regarded as" test. (*See* Doc. No. 14 at 3; Farkas Dep. at 38-40.) The fact that Defendant removed Plaintiff from that one particular job does not establish that Defendant regarded Plaintiff's stroke as substantially limiting his ability to work at a broad class of jobs. Indeed, Plaintiff's compensation and benefits were not affected by the transfer of these responsibilities, and Plaintiff still had a "full plate" of duties without the fuel injection job. (Farkas Dep. at 38-40.)

[4] It is worth noting that in 2001 and 2002, Defendant went through a downsizing in which forty percent of its salaried employees were terminated. This included at least three people who were under

(Continued on following page)

failed to offer evidence of "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" to rebut Defendant's nondiscriminatory reasons. *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). The fact that Defendant's reasons may have been wrong, or mistaken, or demonstrated a complete lack of loyalty to an employee of over twenty years service does not render the employer's reasons pretextual. *See id.* ("To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.").

E. PHRA Claim

We similarly conclude that Plaintiff has not provided sufficient evidence of a disability under the PHRA. The PHRA definition of disability is nearly identical to that of the ADA: "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment. . . . " 43 Pa. Cons. Stat. § 954(p.1). "The PHRA is basically the same as the ADA in relevant respects and 'Pennsylvania courts . . . generally interpret the PHRA in accord with its federal counterparts.'" *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 382 (3d Cir. 2002) (citing *Kelly*, 94 F.3d at 105). Therefore, we will grant Defendant's Motion with respect to Plaintiff's PHRA claim also.

McGraw's supervision. Plaintiff's responsibilities increased as a result of the downsizing.

IV. CONCLUSION

Plaintiff has not met his burden to establish a prima facie case under the ADA or the PHRA. He has failed to provide evidence demonstrating that he has a disability as defined by these statutes. He has also failed to establish that Defendant's reasons for terminating him were pretextual. Accordingly, we will grant Defendant's Motion for Summary Judgment.

An appropriate Order follows.

ORDER

AND NOW, this 8th day of March, 2006, upon consideration of Defendant's Motion For Summary Judgment, it is ORDERED that Defendant's Motion is GRANTED, and judgement is entered in favor of Defendant Carpenter Technology Corp. and against Plaintiff David Farkas.

IT IS SO ORDERED.

BY THE COURT:

S/ R. Barclay Surrick, Judge

APPENDIX B

MARX OLDS, Plaintiff-Appellant v. UNITED PARCEL SERVICE, INC., Defendant-Appellee

No. 03-1920

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

127 Fed. Appx. 779; 2005 U.S. App. LEXIS 5501

April 1, 2005, Filed

COUNSEL: For MARK OLDS, Plaintiff-Appellant: Mary Katherine Norton, Detroit, MI; Steven A. Hicks, Knaggs, Harter, Brake & Schneider, Lansing, MI

For UNITED PARCEL SERVICE, INC., Defendant-Appellee: Kathleen McCree Lewis, Dykema Gossett, Detroit, MI; Stephen S. Muhich, Kelley E. Stonnels, Dykema Gossett, Grand Rapids, MI

JUDGES: BEFORE: NORRIS, BATCHELDER AND ROGERS, Circuit Judges.

OPINION:

PER CURIAM. Plaintiff Mark Olds appeals from the district court's grant of summary judgment in favor of defendant United Parcel Service, Inc. ("UPS"), in this disability discrimination action under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 ("ADA").[1]

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[1] The district court also granted summary judgment is favor of UPS on Olds' claims for retaliation in violation of the ADA and the Michigan Workers Disability Compensation Act. On appeal, Olds does not challenge the decision to grant UPS summary judgment on those claims.

I.

The district court set forth the facts of the case in an opinion granting summary judgment to UPS:

> Plaintiff Mark Olds worked as a package delivery driver for Defendant United Parcel Service, Inc. ("UPS") at its St. Joseph, Michigan facility from September 1982 until January 8, 1998.
>
> Plaintiff is 52 years old, married, and has three children. He has a high school education and an associate's degree in business. Prior to beginning employment with Defendant, Plaintiff worked at various manual labor jobs including welding, machining auto parts, construction, and carpentry. All parties agree Plaintiff had an excellent employment record while with UPS.
>
> In 1997, Plaintiff was diagnosed with monoclonal gammopathy of undetermined significance, a condition involving an abnormal protein that leads to cancer 20 percent of the time. This diagnosis had no impact on Plaintiff's ability to work. After sustaining a compression fracture in his neck while on the job in January 1998, Defendant was diagnosed with multiple myeloma, a cancer affecting bone marrow. Plaintiff went on short-term disability after sustaining this injury. After undergoing chemotherapy, Plaintiff sought to return to work in May 1998 pursuant to his doctor's approval. Plaintiff was initially under a 25 pound lifting restriction and precluded from doing any kind of repetitive bending or twisting. This was later increased to a 40 pound restriction in January 1999, and the lifting restriction was made permanent in September 1999. Plaintiff was also instructed not to perform certain repetitive activities that might put sudden, excessive

force on his bones. Plaintiff underwent a bone marrow transplant in September 2002. He was cleared to work in January 2003, still under a 40 pound lifting restriction.

Plaintiff first inquired about accommodation for his weight restriction in February 1999 and formally sought accommodation in September 1999. Plaintiff sought permission to use a two-wheel dolly to deliver packages over 40 pounds in weight. In October 1999, Plaintiff submitted a written request for Defendant to make this accommodation available to him.[1] Defendant denied Plaintiff's request for accommodation on the basis that it did not find him entitled to one under the Americans with Disabilities Act of 1990 ("ADA"). Defendant also informed Plaintiff he was not qualified to return to work because of his lifting restriction. Plaintiff filed a grievance with respect to Defendant's refusal to let him return to work under a 40 pound lifting restriction. The grievance was appealed to a state panel which upheld UPS's decision as not being in violation of the collective bargaining contract. The panel did not address whether Defendant should provide Plaintiff with any accommodation or whether other positions were available.

After being denied the opportunity to return to his old job as a package delivery driver, Plaintiff bid on a number of openings at the St. Joseph facility, including delivery driver positions, a customer clerk opening, a porter position, and an air shuttle driver job. His application for each was denied on the ground that he was unable to perform the essential job function of being able to lift over 40 pounds regardless of his seniority.

Plaintiff is currently collecting Social Security Disability benefits, for which he applied in January 1998, pursuant to his diagnosis. Immediately after sustaining his injury, Plaintiff also filed a worker's compensation claim that Defendant initially denied. Subsequently, in May 1999, upon review by a Magistrate Judge, Plaintiff was awarded worker's compensation benefits for a closed period from January to October 1998, the time during which Plaintiff's compression fracture was healing. In June 2000, Plaintiff filed a charge of discrimination with the Michigan Department of Civil Rights, which, as far as the Court can determine from the record, recommended referral of the case to conciliation.

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[1] Defendant instructs its drivers to use a two-wheel dolly when delivering packages over 70 pounds and places no restriction on a driver's decision to use a dolly for lesser weight packages. Defendant also recommends use of a dolly when delivering multiple packages and/or envelopes to one location regardless of their individual or cumulative weight. The Court also notes, drivers are allotted a certain amount of time in which to complete their routes based on time studies periodically conducted by Defendant. Use of a dolly generally increases the allotted delivery time by approximately 15 seconds. Such an allotment is granted to account for the time needed to deliver packages over 70 pounds with a dolly.

Opinion, June 17, 2003 at 1-3 (footnote in original).

The district court granted summary judgment to defendant because it found that plaintiff was not disabled as defined by the ADA. The court held that Olds did not suffer from an impairment that substantially limited a

major life activity because "a lifting restriction alone does not constitute a disability." Opinion, June 17, 2003, at 5. The court also concluded that Olds was not substantially limited in a major life activity because he did not demonstrate a significant restriction on his ability to obtain employment in a broad range of jobs. In the same vein, the court determined that Olds did not suffer from a record of impairment that substantially limited a major life activity: "At no time, based on the record before the Court, has Plaintiff's physical impairment substantially limited one or more of his major life activities." Opinion, June 17, 2003, at 11. Finally, the district court held that Olds did not suffer from being regarded as having an impairment that substantially limited a major life activity. It determined that UPS did not permit Olds to return to work because of his lifting restriction, and that Olds did not raise a question of fact with respect to whether UPS entertained a misperception about him.

II.

This court reviews a grant of summary judgment *de novo. Motorists Mut. Ins. Co. v. Hammond,* 355 F.3d 593, 596 (6th Cir. 2004). Summary judgment must be granted pursuant to Fed. R. Civ. P. 56(c) if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. All evidence and inferences must be construed in the light most favorable to the non-moving party. *Shah v. Deaconess Hosp.,* 355 F.3d 496, 498 (6th Cir. 2004).

To state a claim under the ADA, a plaintiff must demonstrate:

> (1) that she is a disabled person within the meaning of the Act, (2) that she is qualified to perform the essential functions of her job with or without reasonable accommodation, and (3) that she suffered an adverse employment decision because of her disability.

McKay v. Toyota Motor Mfg., U.S.A., Inc., 110 F.3d 369, 371 (6th Cir. 1997). The parties do not dispute that Olds suffered an adverse employment action, but do contest the other two elements of the test.

"Disability" under the ADA means:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). A plaintiff who claims that he is disabled because a condition substantially limits his ability to engage in the "major life activity" of working must show that he is "significantly restricted in [his] ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person with comparable training, skills and abilities." *McKay,* 110 F.3d at 371. (quoting 29 C.F.R. § 1630.2(j)(3)(i)). Olds accordingly can survive summary judgment if he can demonstrate that he was subject to any one of these three conditions and that he was restricted in his ability to work in a "class of jobs" or a "broad range of jobs in various classes." *Id.* However, the "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

We agree with the district court that Olds is not so physically impaired that he is disabled as defined by the ADA. Olds argues that he has a physical impairment, cancer, which creates a weight restriction that substantially limits a major life activity: his ability to work. However, as the district court correctly concluded, the general rule in this circuit is that a weight restriction alone is not considered a disability under the ADA. Opinion, June 17, 2003, at 5-7 (citing *Gayer v. Cont'l Airlines,* 21 Fed.Appx. 347 (6th Cir. 2001) (unpublished)); *see also McKay,* 110 F.3d at 373 (holding that plaintiff's inability to lift more than ten pounds would not significantly restrict her ability to perform a broad range of jobs in various classes). Olds' lifting restriction prevents him from working as a delivery driver and from performing other jobs at UPS specifically, but there is no evidence in the record that it prevents him from engaging in a broad class of jobs.

Similarly, Olds has not raised a genuine issue of material fact that he has a "record of impairment." "A record of an impairment means an individual has 'a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.'" *MX Group, Inc. v. City of Covington,* 293 F.3d 326, 339 (6th Cir. 2002); (citing 28 C.F.R. § 35.104(3)). The district court determined that Olds' physical impairments limited his ability to meet his job requirements, but did not limit one or more major life activities. We agree with the district court for the same reasons that led us to conclude that Olds was not disabled as defined by the ADA.

That said, we depart from the decision in one respect: we hold that Olds has raised a genuine issue of material

fact about whether UPS regarded him as having an impairment. To succeed in demonstrating that he is "regarded as having . . . an impairment," a plaintiff must show the following:

> (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.

Ross v. Campbell Soup Co., 237 F.3d 701, 706 (6th Cir. 2001) (citing *Sutton v. United Air Lines*, 527 U.S. 471, 489, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999)). The district court concluded that there was no evidence to indicate that UPS discriminated against Olds based upon a misperception; rather, it concluded that UPS refused him employment based upon an accurate understanding of his limitations – that he could not lift 40 pounds.

However, a former UPS employee testified that a UPS corporate lawyer said that Olds should not be reinstated because he had cancer. Furthermore, the former employee testified that UPS did not want to accommodate Olds because it did not want to rehire him: "we didn't want to come right out and say that because of Mark's condition, his cancerous condition, that he couldn't do the job." The same employee also indicated that UPS changed the lifting requirements of certain positions to avoid accommodating

Olds. A reasonable jury could infer that UPS believed that Olds' condition was significantly more disabling than it actually was, and for that reason UPS did not want to reinstate him. Olds has accordingly raised a genuine issue of material fact as to whether UPS regarded him as having an impairment.

Because the district court determined that Olds was not disabled as defined by the ADA, it did not reach the question of whether he was qualified to perform the essential functions of his job. UPS argues that Olds cannot perform the task of lifting up to 70 pounds without assistance, a task defined by UPS as essential. Olds suggests that the weight-lifting requirements are arbitrary because they were changed without regard to job duties to make the lifting requirements "uniform" for all jobs at the St. Joseph facility. He also contends that other package delivery drivers with back problems had been given permission to use dolly carts and request customer assistance for limited periods of time. Accordingly, on remand, the district court will need to determine what the "essential functions" of UPS jobs are and whether Olds reasonably can perform them with an accommodation.

UPS argues that Olds is precluded from demonstrating that he is qualified because an administrative law judge found him entitled to Social Security Disability benefits. We disagree. Under the Supreme Court's decision in *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 807, 143 L. Ed. 2d 966, 119 S. Ct. 1597 (1999), Olds is required to give a "sufficient explanation" as to how he can perform the essential functions of the job, given the Social Security Administration's determination of total disability. However, because the Social Security Administration assesses only what a claimant can do, while the relevant inquiry

under the ADA asks what the claimant can do *with or without accommodation,* the only explanation that a plaintiff need provide is that he can perform the work in question *with accommodation.* As stated by the Supreme Court:

> To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement [to the Social Security Administration], the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodation."

Id. Because Olds has suggested two accommodations, namely, either a transfer to another position, or permission to use the dolly cart and to request customer assistance with packages over 40 pounds, it appears that he can provide a satisfactory "explanation."

III.

The judgment of the district court is **reversed** and the case is **remanded** to the district court for further proceedings consistent with this opinion.

APPENDIX C

JOSEPH M. SEBEST, Plaintiff-Appellee v. CAMPBELL CITY SCHOOL DISTRICT BOARD OF EDUCATION; MICHAEL TSIKOURIS, Defendants-Appellants.

No. 02-4012

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

94 Fed. Appx. 320; 2004 U.S. App. LEXIS 7173

April 8, 2004, Filed

COUNSEL: For JOSPEH M. SEBEST, Plaintiff-Appellant: Eric E. Norton, The Norton Law Firm, Cleveland, OH.

For CAMPBELL CITY SCHOOL DISTRICT BOARD OF EDUCATION, MICHAEL TSIKOURIS, Defendants-Appellees: James E. Roberts, Roth, Blair, Roberts, Strasfeld & Lodge, John C. Pfau, Pfau, Pfau & Marando, Youngstown, OH.

JUDGES: Before: BATCHELDER, GIBBONS, and COOK, Circuit Judges.

OPINION BY: JULIA SMITH GIBBONS

OPINION:

JULIA SMITH GIBBONS, Circuit Judge. Joseph Sebest became treasurer of the Campbell City school district for a probationary term starting in March 1999. Sebest's employment with the school district elapsed on January 11, 2000, when his contract expired, and the Campbell City School District Board of Education (the "Board") offered him a new employment contract that provided for an annual salary approximately $4,000 less than the salary earned by Sebest under his first contract. Sebest rejected the second contract and filed suit in the

United States District Court for the Northern District of Ohio against the school board and one of its members, Michael Tsikouris, for violations of federal and state disability discrimination law. Sebest and the defendants filed cross-motions for summary judgment, and the district court granted summary judgment to the defendants.

On appeal, Sebest challenges the district court's factual assumption that Tsikouris's views on Sebest's health did not influence other members of the school board. Accordingly, Sebest argues that the district court erred in granting summary judgment to the defendants on his disability discrimination claims. Sebest also asserts that the district court erred in deciding that he had not brought suit against Tsikouris in his individual capacity. For the reasons set forth below. we affirm the grant of summary judgment to the Board and Tsikouris.

I.

In the early 1980s, Sebest was diagnosed with chronic myelogenous leukemia.[1] As treatment for his leukemia, he received a bone marrow transplant in 1984. Because of the transplant, Sebest acquired graft-versus-host disease, a condition that affects the lungs. Around 1999, Sebest experienced breathing-related difficulties, such as shortness of breath when he exerted himself, sinus drainage, and sputum production. His treating physician, Dr. Clay Braden Marsh, categorized Sebest's condition in 1999 as severe obstructive pulmonary lung disease and probably a

[1] In a 2002 deposition, Sebest stated that he no longer suffers from leukemia.

combination of bronchiectasis and *bronchiolitis obliterans.*[2] Dr. Marsh testified that during this period Sebest generally could perform daily functions – such as getting up in the morning, brushing his teeth, and driving to work – but that his breathing problems became aggravated by stress or strenuous activity. According to Dr. Marsh's testimony, Sebest's abnormal pulmonary function may prevent him from being able to walk up a flight of stairs "on his bad days."

On March 25, 1999, the Board convened a special meeting to hire a probationary treasurer for the district. At the meeting, board member Bernard Petro remarked that Sebest had suffered from leukemia in the past. Board member Tsikouris asked the other board members if Sebest, who was in attendance for parts of the meeting, looked frail and whether he should be hired since he might not be well. Tsikouris also discussed Sebest's $300 health insurance deductible. In addition, Tsikouris expressed concern that a recurrence of Sebest's illness could be costly to the school district. The other board members declined to discuss these issues, and several members even told Tsikouris that his comments were inappropriate.

Sebest was hired by the Board at an annual salary of $48,000, with three members voting in favor of his hiring and Tsikouris and another board member voting against it. Sebest then entered into a contract with the school board, which stated:

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[2] According to Dr. Marsh, bronchiectasis is abnormal dilation of the lower airways, which can predispose individuals to develop infections in the lung. *Bronchiolitis obliterans* occurs when there has been a small obliteration in the lungs and can be caused by graft-versus-host disease.

> This contract of employment entered into this 25th day of March 1999 by and between the Board of Education of the Campbell City School District, Mahoning County, Ohio, and Joseph M. Sebest hereafter designated as Treasurer.
>
> The said Board of Education, pursuant to motion duly adopted and in accordance with the provisions of Revised Code [§] 3313.22 hereby employs the said Joseph M. Sebest as Treasurer for a one (1) year probationary term beginning on April 6, 1999 through the Organizational Meeting in January of 2000.
>
> The said Board of Education in consideration of the services rendered by the Treasurer, hereby agrees to pay the said Treasurer an annual salary of $48,000.00 as adopted by the Board on March 25, 1999. If a renewal contract is adopted, said annual salary will be negotiated for each year of the contract and may be increased by action of the Board of Education at any time as per Ohio Revised Code [§] 3313.24. That the Treasurer per diem be based on 260 work days and divided into his total annual salary.
>
> The said Treasurer agrees to enter into this contract of employment for the above designated term, and to diligently and faithfully perform his duties as Treasurer in accordance with the law for the above designated term or until such time as his contract may be terminated as prescribed by law.

Sebest served as school district treasurer for the period specified in his contract.

On January 11, 2000, the school board held its organizational meeting – the point at which Sebest's employment under his contract elapsed – and adopted a resolution offering Sebest a two-year probationary contract with compensation and benefits to be determined at a later time. On January 25, the Board adopted another resolution, which set the salary for treasurer at $44,000 and increased the contribution made on Sebest's behalf to the School Employees Retirement System from two percent to five percent of his salary.[3] The resolution also stated that a formal written contract would be prepared at a later date and presented to Sebest, who would then have two weeks to decide whether or not to accept it. On January 31, 2000, the Board presented Sebest with the proposed written contract, which Sebest eventually rejected.

Sebest pursued an ultimately unsuccessful administrative appeal of his dismissal in the Ohio Court of Common Pleas. Sebest then filed suit against the Board and Tsikouris in district court for disability discrimination under the *Americans with Disabilities Act of 1990* ("ADA") and the *Rehabilitation Act of 1973*. Sebest also alleged additional federal and state law claims.[4]

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[3] The Board members suggested the following annual salary figures for Sebest's second contract: $38,000 (Board member Rohan); $42,000 (Board member Tsikouris); $41,000 (Board member Rusnak); $48,000 (Board member Cougras); and $48,000 (Board member Gerlick). The Board eventually decided to offer Sebest a salary of $44,000 by averaging the salary figures provided by each of the five board members.

[4] Sebest's complaint alleged the following claims: violations of Ohio Rev. Code § 4112; breach of contract; violation of 42 U.S.C. § 1983; wrongful discharge in violation of public policy (disability discrimination); wrongful discharge in violation of public policy (Ohio Rev. Code § 3313.22); promissory estoppel; intentional infliction of emotional

(Continued on following page)

Sebest and defendants filed cross-motions for summary judgment. The district court denied Sebest's motion and granted defendants' motion for summary judgment with respect to Sebest's claims under the ADA, the Rehabilitation Act, and wrongful discharge in violation of public policy (disability discrimination).[5] The district court held that "examining all of the evidence in the light most favorable to Sebest, there is nothing on this record to show that the Board discriminated against Sebest on the basis of a real or perceived disability." Sebest appeals the district court's decision.

II.

This court reviews a district court's order granting summary judgment *de novo*. *Laderach v. U-Haul*, 207 F.3d 825, 827 (6th Cir. 2000). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A dispute over a material fact cannot be 'genuine' unless a reasonable jury could return a verdict for the nonmoving party." *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001). In performing this review, we must draw inferences

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distress; and a claim for punitive damages. The district court granted Sebest's motion to dismiss the claims for violation of 42 U.S.C. § 1983, wrongful discharge in violation of public policy (Ohio Rev. Code § 3313.22), and intentional infliction of emotional distress.

[5] The district court also dismissed Sebest's remaining state law claims because these claims "substantially predominate[] over the claim or claims over which the district court has original jurisdiction." *See* 28 U.S.C. § 1367(c)(2).

from the evidence in the light most favorable to the non-moving party. *Andersons, Inc. v. Consol, Inc.*, 348 F.3d 496, 501 (6th Cir. 2003). "Accordingly, summary judgment must be entered 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Laderach*, 207 F.3d at 828 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

Sebest asserts that there is direct and indirect evidence that the Board discriminated against him because he is disabled. We affirm the district court's conclusion that the record does not support this claim. Specifically, Sebest has failed to present evidence that the *Board* – the decision-maker in this case – made decisions with respect to Sebest's employment based on his disability. Even assuming *arguendo* that the school board did make such decisions, we are unpersuaded that Sebest meets the definition of disability provided in the ADA.

A.

In considering Sebest's discrimination claims, we must first review his challenge to the district court's factual assumption that Tsikouris's discussions about Sebest's health did not influence the decision of other board members to offer Sebest a second employment contract at a lower salary. On this point, the district court stated, "it is clear that the decision-maker/employer, that is, *the Board*, was not influenced by Tsikouris." We review *de novo* a district court's factual assumptions made at the summary judgment stage. *Brennan v. Township of Northville*, 78 F.3d 1152, 1156 (6th Cir. 1996).

We see no reason to disturb the district court's determination that Tsikouris's personal views of Sebest did not direct the decision-making of the five-member Board. Sebest has presented evidence that Tsikouris made statements at the March 25, 1999, school board meeting about Sebest having leukemia. While members serving on the Board at that time testified that Tsikouris asked questions about Sebest's health and his health insurance deductible, Sebest has not presented any evidence that Tsikouris's remarks were shared – or were even considered – by other members of the Board. This conclusion is bolstered by the fact that, after Tsikouris raised the issue of Sebest's health, three board members told Tsikouris that his remarks were inappropriate. Furthermore, at the same meeting that Tsikouris discussed Sebest's health, the Board proceeded to hire Sebest under the first contract. The following year, the Board voted to offer him a second employment contract. In sum, while the record may provide information about Tsikouris's personal views, it does not indicate that a majority of the Board – the only entity able to make decisions about Sebest's employment – supported his opinion.

B.

Even if we construed Tsikouris's comments about Sebest to reflect the opinion of at least a majority of the Board, Sebest has not met his burden of showing that he is disabled under the ADA. To recover on an ADA claim, an individual must establish that he or she was a qualified individual with a disability at the time of the discriminatory act. *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 884 (6th Cir. 1996). In the ADA, the term "disability" is defined as, with respect to an individual: "[1] a physical or mental

impairment that substantially limits one or more of the major life activities of such individual; [2] a record of such an impairment; [3] or being regarded as having such an impairment." 42 U.S.C. § 12102(2). Sebest claims that he is disabled under all three definitions.

Sebest first argues that his breathing is substantially limited. Breathing is indeed a "major life activity" for purposes of the ADA, 29 C.F.R. § 1630.2(i), because it is an activity "of central importance to daily life." *See Toyota Motor Mfg. v. Williams,* 534 U.S. 184, 197, 151 L. Ed. 2d 615, 122 S. Ct. 681 (2002) (providing definition of "major life activity"). The term "substantially limits" in the definition of disability means

> unable to perform a major life activity that the average person in the general population can perform; or *significantly restricted* as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (emphasis added). In considering whether an individual is substantially limited in a major life activity, the following factors are relevant:

> [1] The nature and severity of the impairment;
>
> [2] The duration or expected duration of the impairment; and
>
> [3] The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

In support of his claim that he is disabled, Sebest points to his affidavit testimony that his physical impairments include shortness of breath and significant difficulty with breathing and that his condition becomes aggravated when he is under stress. Sebest also cites the testimony of Dr. Clay Marsh, who stated that Sebest's condition affects his breathing when Sebest is under stress or has engaged in strenuous activity. Dr. Marsh did not indicate that Sebest's breathing is affected in the absence of these factors. In fact, Dr. Marsh testified that at the time Sebest was hired and served as school district treasurer, Sebest was able to perform normal daily functions – activities such as showering, eating, and driving to work – and was able to complete his job as treasurer. Only during what Dr. Marsh described as Sebest's "bad days" would Sebest encounter difficulty in breathing. The record does not indicate how often Sebest had a "bad day" or the duration of such a period.

This testimony fails to demonstrate that Sebest's condition *substantially* limits his breathing. Clearly Sebest's impairment does not render him unable to breathe. Therefore, for Sebest to demonstrate that his impairment substantially limits his breathing, he must present evidence such that a reasonable jury could find that his impairment significantly restricted the condition or manner of his breathing, as compared to the average person in the population.[6] Looking to the nature and severity of Sebest's impairment, as explained by Sebest's statements and the testimony of Dr. Marsh, we conclude

[6] We note that Sebest has only presented arguments that he is disabled because his impairment interferes with breathing and not because his impairment interferes with any other major life activity.

that Sebest has not presented such evidence. Both Sebest and his treating physician testified that his breathing becomes affected under stress or strenuous conditions. The record lacks any evidence indicating that, when Sebest is not under stress or is not performing a strenuous activity, his breathing is significantly restricted. Therefore, Sebest does not meet the first definition of disability in the ADA. *See Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996) (noting that "several instances of shortness of breath when climbing stairs do not rise to the level of *substantially* limiting the major life activity of breathing"); *Minnix v. City of Chillicothe*, 2000 U.S. App. LEXIS 2099, No. 98-4285, 2000 WL 191828, at *2 (6th Cir. Feb. 10, 2000) (holding that plaintiff failed to present a genuine question of material fact that impairment substantially limited breathing when there was no medical evidence that plaintiff's breathing problems were "severe, long term, or permanent"); *Ventura v. City of Independence*, 1997 U.S. App. LEXIS 4102, No. 95-3582, 1997 WL 94688, at *2 (6th Cir. Mar. 4, 1997) (finding that plaintiff with asthma, which caused him difficulty breathing but did not prevent him from engaging in activities such as walking or playing baseball, was not substantially limited in breathing).[7]

Sebest also argues that he is disabled because he previously suffered from leukemia and leukemia-related

[7] In his brief, Sebest cites *U-Haul Co. v. Kunkle*, an unpublished decision, for the proposition that a plaintiff who experienced breathing problems that occasionally required him to go "out to [his] truck to get oxygen" in order to breathe was disabled under the ADA. 165 F.3d 29, 1998 WL 681253, at *3 (6th Cir. 1998) (alteration in original). Unlike the plaintiff in *Kunkle*, Sebest has not presented evidence that he has ever needed an oxygen tank in order to breathe.

health problems, thereby indicating that he has a record of a disability. While Sebest has presented evidence to show that he has suffered from leukemia in the past, he has not presented evidence demonstrating that he has a record of an impairment that substantially limits a major life activity. Sebest appears to assume that by having leukemia, he necessarily has a record of a disability. This understanding, however, is in conflict with the language of the ADA. An individual is disabled if he or she has a record of a physical or mental impairment that substantially limits a major life activity. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g)(2) (incorporating 29 C.F.R. § 1630.2(g)(1)); *see also* 29 C.F.R. § 1630.2(k) (stating that a person is disabled by having a record of an impairment when that person "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities").

Sebest has not provided evidence that the leukemia from which he suffered in the 1980s substantially limited a major life activity. Declaring leukemia a disability *per se* would contravene this court's "statutory obligation to determine the existence of disabilities on a case-by-case basis." *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555, 566, 144 L. Ed. 2d 518, 119 S. Ct. 2162 (1999). As the Supreme Court has explained, "the [ADA] expresses that mandate clearly by defining 'disability' 'with respect to an individual,' 42 U.S.C. § 12102(2), and in terms of the impact of an impairment on 'such individual,' § 12102(2)(A)." *Id.*; *see also Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 483, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999) (noting that "whether a person has a disability under the ADA is an individualized inquiry"); *Bragdon v. Abbott,* 524 U.S. 624, 641-42, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998)

(declining to consider whether HIV is a *per se* disability under the ADA); 29 C.F.R. Pt. 1630, App. § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."). Since Sebest has failed to present evidence that he has a record of an impairment that substantially limits a major life activity, he is not disabled under the second definition of disability provided in the ADA.

Finally, Sebest argues that he was "regarded as" having a disability by his employer because of the concerns about Sebest's health expressed by Tsikouris at the March 25, 1999, board meeting. The Supreme Court has stated that there are two ways in which an individual can be regarded as disabled: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton*, 527 U.S. at 489.

As we previously discussed, decisions about Sebest's employment were made by the five member school board. Besides Tsikouris's comments, Sebest has offered no evidence that the *school board* made decisions regarding Sebest's employment with any consideration of his health condition. Therefore, as Sebest has failed to present evidence that a reasonable jury could find him to be disabled under the definitions of disability provided in the

ADA, we affirm the grant of summary judgment to the defendants.[8]

Because we affirm the grant of summary judgment to the Board and Tsikouris, we do not need to consider whether Sebest sued Tsikouris in his individual or official capacity.

III.

For the foregoing reasons, we affirm the decision of the district court granting summary judgment to the defendants.

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[8] Sebest asserts that he is also protected under Ohio disability discrimination law, Ohio Rev. Code § 4112.02. Our decision on Sebest's ADA claim is also dispositive of his state law disability claim. *Lockard v. Gen. Motors Corp.*, 52 Fed. Appx. 782, 785 n.2 (6th Cir. 2002) ("This court's ruling with respect to [plaintiff's] ADA claim also disposes of her claim of disability discrimination under Ohio law."); *see also City of Columbus Civil Serv. Comm'n v. McGlone*, 82 Ohio St. 3d 569, 1998 Ohio 410, 697 N.E.2d 204, 206-07 (Ohio 1998) ("The federal Americans with Disabilities Act . . . is similar to the Ohio handicap discrimination law. . . . We can look to regulations and cases interpreting the federal Act for guidance in our interpretation of Ohio law.").